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by *Ya'akov Meron**

I. INTRODUCTION

The Agreement between Egypt and Israel calling for autonomy to the Palestinians,[1] as well as Israel's continued policy of establishing settlements, have brought to the forefront of international concerns questions pertaining apparently to private law. Not long before the official opening of the negotiations concerning the future of the Palestinian Arabs, a high ranking American diplomat stated that one of the basic issues to be resolved was: "who controls the [public] lands . . ., who has the authority to transfer the land, [and] who has authority to [a]ppropriate the land."[2] Bold statements have been made with regard to the legality of the settlements established by Israel. It is the author's submission that talk about "expropriation" is largely beside the point. Under the local land law there are considerable stretches of land where this mode of acquisition is superfluous and indeed inapplicable, the land being "waste land." This category of land is well known in the law of the countries of the Middle East and has been recognized in international law. After an examination of the history of waste land under the British Mandate on Palestine

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1. This agreement took the form of a letter addressed jointly by President Sadat of Egypt and Prime Minister Begin of Israel, to President Carter of the United States. It was signed on the same day as the Peace Treaty between Egypt and Israel, on March 26, 1979, *reprinted in* 18 INT'L LEGAL MAT'LS 362, 530. *See* 3 MIDDLE EAST CONTEMPORARY SURVEY FOR 1979 (1980).

2. *Supplemental Middle East Aid Package for Israel and Egypt: Hearing on the Special International Security Act of 1979 Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 82 (1979) (statement of Harold H. Saunders, U.S. Assistant Secretary of State for Near Eastern and South Asian Affairs).

(British Mandate)[3] and Ottoman Land Law,[4] this article will detail the legal status of waste lands in the national law of Arab States in the Middle East. Second, this article will discuss the status of waste land under Principles of International Law, and will examine territorial assertions made in reliance upon notions prevalent in the Moslem world. It is the author's contention that there is no basis under any national legal system or principle of international law for the assertion that Judea and Samaria are wholly state-owned lands. The doctrine of waste land legitimizes the presence of Israeli settlements in Judea and Samaria. The author concludes that the doctrine of waste land can also be used to alleviate the dispute concerning sovereignty over the West Bank of the Jordan River.

II. HISTORICAL CONTEXT

A. *The Mandate on Palestine*

The earliest international document containing a reference to land in Palestine not owned by private individuals is the British Mandate,[5] which was ratified by the League of Nations on July 24, 1922. It is clear that the British authorities participating in the drafting of the document were aware of its content well before ratification.[6] Article 6 of the British Mandate states that:

> *The Administration of Palestine,* while ensuring that the rights and position of other sections of the population are not prejudiced, shall facilitate Jewish immigration under suitable conditions and *shall encourage,* in co-operation with the Jewish agency referred to in Article 4, *close settlement by Jews on the land, including State lands and waste lands* not required for public purposes.[7]

It is necessary to define the term "waste land" in the proper historical context. The reference in the mandate can apparently be understood consistently

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3. British Mandate on Palestine, League of Nations Council (13th Sess.) P.V. 13, at 5 (July 24, 1922) [hereinafter cited as British Mandate], *reprinted in* Government Printer of Palestine, *A Survey of Palestine 4* (1946).

4. Ottoman Land Law of 1858 [hereinafter cited as Ottoman Land Law]. The text is translated from the original Turkish in F. ONGLEY, THE OTTOMAN LAND CODE (rev. ed. H. Miller 1892) [hereinafter cited as ONGLEY translation].

5. *See* note 3 *supra.*

6. DOCUMENTS ON BRITISH FOREIGN POLICY 1913-1919, (1st series 1962). The British Foreign Minister, Earl Curzon, in a letter dated December 26, 1920, objected to the publication of the Franco-British Convention on the grounds that its Article 9 "actually refers to articles of the mandates" and "[a]wkward questions might be raised in Parliament and press if the Convention containing these references were published before the mandates had been approved or published." *Id.*

7. *See* note 3 *supra* (emphasis supplied). State lands (*miri*) and waste land (*mewat*) are two of the five categories of land recognized by the 1858 Ottoman Land Law. The other three are private land (*Mulk*), land in public use *ab antiquo (metruke),* and endowed land (*waqf*). *See* Ottoman Land Law arts. 2-6. *See* ONGLEY translation, *supra* note 4, at 1-7.

with the usage of the term in the Palestine Land Registry entries under the British Mandate. A Land Registry entry of this kind was considered by the Supreme Court of Israel in *Local Council of Yafi v. State of Israel.*[8] In that case the expression "waste land" was applied to a piece of *miri* land. Land of this category is referred to as "state land" by the Courts[9] in accordance with the Ottoman Land Law.

B. *The Ottoman Land Law*

Article 3 of the Ottoman Land Law provides the most authoritative definition of the term "state land."[10] In contrast with Israeli law prior to the 1969 Israeli Land Law,[11] state ownership of *miri* land under the Ottoman Land Law was not an empty concept.

In the early 1920's and, to a large extent, to the present, in Judea and Samaria,[12] state ownership had several legally significant attributes. The person in possession (*tasarruf*) of state land had no right to let the land lie fallow[13] or to turn the land into a graveyard.[14] Additionally, the person in possession could neither dedicate the land as an endowment (*waqf*),[15] nor bequeath it by will.[16] Special succession laws govern *miri* land. These statutes are quite different from the religious succession laws ordinarily applicable.[17] However, these special characteristics of state land did not deter land registrars from applying the term "waste land" to state (*miri*) lands during the period of the

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8. Local Council of Yafi v. State of Israel, further hearing (Oct. 13, 1976) 31(2), PISKEI DIN [P.D.] 605.

9. *See, e.g.*, Sultan v. Attorney General, [1947] 14 PALESTINE LAW REPORTS [P.L.R.] 115, 125. "The land in dispute in this case is admittedly of the *miri* category. That is to say, it is land the legal ownership of which is vested in the State." *Id.*

10. State Land, the legal ownership of which is vested in the Treasury, comprises arable fields, meadows, summer and winter pasturing grounds, woodland and the like, the enjoyment of which is granted by the Government. Possession of such land was formerly acquired in case of sale or of being left vacant by permission of or grant by feudatories (*sipahis*) of "*timars*" and "*ziamets*" as lords of the soil, and later through the "*multezims*" and "*muhassils.*" This system was abolished and possession of this kind of immovable property will henceforward be acquired by leave of and grant by the agent of the Government appointed for the purpose. Those who acquire possession will receive a title-deed bearing the Imperial Cypher.

    The sum paid in advance (*muajele*) for the right of possession which is paid to the proper official for the account of the State, is called the *tapou* fee.

Ottoman Land Law, art. 3. *See* ONGLEY translation, *supra* note 4, at 3.

11. Israeli Land Law 5729 (1969), *translated in* 5 ISRAEL L. REV. 292 (1970).

12. The Ottoman Land Law is still in force in Judea and Samaria.

13. Ottoman Land Law, arts. 9, 68. *See* ONGLEY translation, *supra* note 4, at 8, 37.

14. Ottoman Land Law, art. 33. *See* ONGLEY translation, *supra* note 4, at 17.

15. Ottoman Land Law, arts. 4, 90. *See* ONGLEY translation, *supra* note 4, at 4, 46.

16. Eliash v. Director of Lands, [1931] 1 P.L.R. 735.

17. In Israel, until the 1965 Succession Law, and in Judea and Samaria, under Jordanian Law to this very day, succession, wills and legacies are "matters of personal status" and as such are subject to personal law, which is mostly religious law.

British Mandate. Thus, it is important to understand why the draftsmen of the British Mandate distinguished waste land from state land.

References by the land registrars under the British Mandate to the classification "waste land" are found only in the "notes" column of the land registers.[18] These notes describe the use to which the land is put rather than its ownership. However, in Article 6 of the British Mandate, waste land is treated as having a status equal to that of state lands.[19] In the same way as the term state land indicates ownership by the state, "waste land" logically refers, not only to the use of the land, but also to its ownership.

III. OWNERSHIP OF THE WASTE LANDS

A. *The Ottoman Land Law*

The 1858 Ottoman Land Law refers to waste land in the context of rights of ownership and possession.[20] After mentioning land privately owned,[21] state land,[22] endowed land,[23] and land reserved for public use,[24] the Ottoman Land Law addresses the status of dead lands (*arazi-mewat*) in Article 6. This article of the Law provides:

> *Arazi-Mewat* is waste (*Khali*) land which is not in the possession of anybody, and, not having been left or assigned to the inhabitants, is distant from town or village so that the loud voice of a person from the extreme inhabited spot cannot be heard, that is about a mile and a half to the extreme inhabited spot, or a distance of about half an hour.[25]

B. *The Woods and Forests Ordinance*[26]

The British legislator[27] in Palestine was aware of the definition of "dead

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18. Local Council of Yafi v. State of Israel, [1976] 31(2) P.D. 605, at 607.
19. British Mandate, *supra* note 3, art. 6.
20. *See* Ottoman Land Law. *See* ONGLEY translation, *supra* note 4.
21. Ottoman Land Law, art. 2. *See* ONGLEY translation, *supra* note 4, at 6.
22. Ottoman Land Law, art. 3. *See* ONGLEY translation, *supra* note 4, at 3-4.
23. Ottoman Land Law, art. 4. *See* ONGLEY translation, *supra* note 4, at 4-6.
24. Ottoman Land Law, art. 5. *See* ONGLEY translation, *supra* note 4, at 6.
25. Ottoman Land Law, art. 6. *See* ONGLEY translation, *supra* note 4, at 6. Fisher translates the opening part of Article six as follows: "Dead land (*mewat*) is land which is occupied by no one." [referred to in the notes as *Khali* land] "and has not been left for the use of the public." FISHER, OTTOMAN LAND LAWS 5 (1919) [hereinafter cited as FISHER].
26. Woods & Forest Ordinance of 1920, GOVERNMENT OF PALESTINE, ORDINANCES AND PUBLIC NOTICES (issued between Oct. 1 and Dec. 31, 1920); OFFICIAL GAZETTE OF THE GOVERNMENT OF PALESTINE, No. 29 [hereinafter cited as Woods & Forest Ordinance]. In the *Mewat* Land Ordinance, GOVERNMENT OF PALESTINE, ORDINANCES AND PUBLIC NOTICES (issued between Jan. 1 and Mar. 31, 1921); OFFICIAL GAZETTE OF THE GOVERNMENT OF PALESTINE, No. 38 (Mar. 1, 1921) [hereinafter cited as *Mewat* Land Ordinance] the expression "waste land" is used again as the English name for this category of land. *See* text accompanying note 123 *infra*.
27. In Israel, the Israeli legislature, which is an Assembly, is referred to as "the legislator." It

lands'' as waste land. This is evidenced by the formulation of Article 6(b) of the Woods and Forests Ordinance of 1920:

> Where a grant of *waste land (mewat)* has been made by the Palestine Government to any person on the condition that he afforests it, the High Commissioner may authori[z]e the forest officer to enter into possession of and manage such land if, in the opinion of the forest officer, within two years from the grant of the concession, proper steps have not been taken to plant the land.[28]

The location of Article 6(b) in the statutory scheme of the ordinance is also significant. Article 6(b) appears after those articles dealing with state forests on land which is not private property,[29] private forests which may be placed under government protection[30] and private forests which the government is able to control.[31] Thus, the placement of the provision relating to waste land strongly suggests that waste land is neither government land nor private land.

This negative definition finds further support and elucidation in Article 103 of the Ottoman Land Law:

> The expression dead land (*mewat*) means vacant (*khali*) land, such as mountains, rocky places, stony fields, *pernallik* and grazing ground which is not in the possession of anyone by title-deed nor assigned *ab antiquo* to the use of the inhabitants of a town or village, and lies at such a distance from towns and villages for which a human voice cannot be heard at the nearest inhabited place. *Anyone who is in need of such land can, with the leave of the Official, plough it up gratuitously and cultivate it* on condition that the legal ownership (*raqabe*) shall belong to the Treasury. The provisions of the law relating to other cultivated land shall be applicable to this kind of land also. Provided that if anyone, after getting leave to cultivate such land, and having had it granted to him, leaves it as it is for three consecutive years without valid excuse, it shall be given to another. But if anyone has broken up and cultivated land of this kind without leave, there shall be exacted from him payment of the *tapou* value of the piece of land which he has cultivated and it shall be granted to him by the issue of a title-deed.[32]

The conclusion to be drawn from Article 103 that waste land is neither state

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may be that the expression originates from the time of the British Mandate when the ''legislator'' was actually one man (the High Commissioner).

28. Woods & Forest Ordinance, *supra* note 26, art. 6(b).

29. *Id.* art. 4.

30. *Id.* art. 5.

31. *Id.* art. 6(a).

32. Ottoman Land Law, art. 103 (emphasis supplied). Ongley translates the emphasized sentence as follows: ''this category of land can be opened up newly and created into arable land with the permission of the official, gratis, by the person having need for it, on condition that its servitude shall belong to the Treasury *Beit ul Mal.*'' ONGLEY translation, *supra* note 4, at 54-55.

nor private land is reconfirmed by Article 107 of the Ottoman Land Law.[33] Minerals found on state land which belong wholly to the state[34] and minerals discovered on private land located "in towns and villages" belong wholly to the private landowners.[35] However, minerals found on waste land, like those found on private land located outside towns or villages, belong only in part to the state. No more than "one fifth of the minerals found belong to the Treasury."[36] Moreover, this similarity between private lands outside towns and villages and waste land suggests that the "one fifth" levied on waste land minerals accrues to the state, not by virtue of any ownership, but rather as a kind of impost.[37]

The proposition that waste lands are not state-owned is buttressed by the fact that Article 103 requires that any individual obtain "leave" (in Turkish-*idhn*) before he begins to vivify waste land.[38]

C. *The Ottoman Civil Code (Mejelle)*[39]

The *Mejelle* offers further guidance as to the impact that the concept of "leave" has on the state ownership of waste land. Commenting upon Article

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33. Ottoman Land Law, art. 107. *See* ONGLEY translation, *supra* note 4, at 57-58.
Minerals such as gold, silver, copper, iron, different kinds of stone, gypsum, sulphur, saltpetre, emery, coal, salt and other minerals found on *State Land,* by whomsoever it is possessed, *belong to the Treasury.* The occupier of the land cannot take possession of any of them, nor claim any share of any mineral which is discovered. Similarly, all minerals found on *mevqufe* land of the *takhsisat* kind belong also to the Treasury; neither the occupier of the land nor the *[w]akf* authority can interfere with regard to it. Provided that in case of both State and *mevqufe* land the possessor must be indemnified to the extent of the value of the land which ceases to be in his possession and under cultivation owing to the working of the minerals. In the case of *metr[u]ke* and *me[w]at* land, *one-fifth of the minerals found belongs to the Treasury* and the rest to the person who finds them. In the case of true *[w]akf* land the minerals belong the the *[w]akf.* Minerals found in *mulk* land in towns and villages belong entirely to the owner of the soil. Fusible minerals found in tithe paying (*uchrie*) and tribute paying land belong as to one-fifth to the Treasury, and the rest to the owner of the soil. All unfusible minerals belong to the owner of the soil. As regards ancient and modern coins and treasure of all kinds of which the owner is unknown, found in any kind of land, the legislation which regulates them is contained in the books of the Sacred Law (*figh*).
(Emphasis added) Ottoman Land Law, art. 107. *See* ONGLEY translation, *supra* note 4, at 57-58.

34. Ottoman Land Law, art. 107. *See* ONGLEY translation, *supra* note 4, at 58.

35. Ottoman Land Law, art. 107. *See* ONGLEY translation, *supra* note 4, at 58.

36. Ottoman Land Law, art. 107. *See* ONGLEY translation, *supra* note 4, at 58.

37. Following vivification the legal nature changes. Under article 103 the vivifier obtains no more than the possession of the vivified land while the "legal ownership" accrues to the Treasury. Ottoman Land Law, art. 103. *See also* ONGLEY translation, *supra* note 4, at 54.

38. Ottoman Land Law, art. 103. *See also* ONGLEY translation, *supra* note 4, at 54-55.

39. OTTOMAN CIVIL CODE [hereinafter cited as *Mejelle*]. The text is translated from the original Turkish in 1 C.A. HOOPER, THE CIVIL LAW OF PALESTINE AND TRANS-JORDAN (1933). The *Mejelle* is a restatement of Moslem Hanafi Law.

1272 of the *Mejelle,* 'Alī Haydar[40] states that the Sultan is obliged to allow the vivifying individual to obtain the ownership of the land.[41] This obligation exists even though an individual fails through ignorance to ask the Sultan for "leave." However, the right to obtain title to vivified land is forfeited in the case of negligent failure to seek "leave."[42]

A revealing difference of opinion exists within Moslem law with respect to the nature of the Sultan's "leave." The view adopted by the *Mejelle* is that of Abū Hanīfa,[43] who was in apparent disagreement with both his disciples, Abū Yūsuf and Al-Shaybani. Abū Yūsuf stated that there was no need for "leave" from the authorities before vivification of waste land. This view was based upon the premise that no vivification is permissible in the vicinity of inhabited areas,[44] an approach that greatly reduced the potential friction between contending vivifiers. Al-Shaybani also did not require the vivifier to obtain prior "leave," but allowed vivification of waste land near inhabited areas.[45] From these differences of opinion it is clear that, certainly as between Abū Yūsuf and Abū Hanīfa, the determinative considerations relate to the maintenance of peace and order. Thus, the eventual intervention of the Sultan is nothing more than a police measure.

Therefore, 'Alī Haydar correctly concluded that "waste land is land which is neither the property of anyone in the pale of Islam, nor endowment nor State land nor pasture nor wood nor cemetery of any town or village."[46]

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40. 'Alī Haydar, President of the Court of Cassation in Constantinople, Professor of Civil Law, is the foremost commentator of the *Mejelle.*

41. *Mejelle* art. 1272, at 295 (Fahmi Al-Huseini's Arabic translation 1932) (this translation includes 'Alī Haydar's commentary upon the *Mejelle*) [hereinafter cited as 'Alī Haydar's commentary]. This conclusion is substantiated by the last sentence of article 103 of the Ottoman Land Law. Ottoman Land Law, art. 103. *See* ONGLEY translation, *supra* note 4, 57-58. *See* text accompanying note 31 *supra. See also* 'ALĪ HĀYDARI, DURAR-U 'L-HUKKĀM (1926). There is a contradiction on this point between the 1858 Ottoman Land Law and the *Mejelle,* which was composed piecemeal more than a decade later, between 1869 and 1876. *See* Meron, *The Mejelle Tested by its Application,* 5 ISRAEL L. REV. 203 (1970). While the 1858 Ottoman Land Law allowed the vivifier no more than possession of the vivified land, the *Mejelle* reproduced the provisions of Moslem law which allows him full ownership of this land. On this contradiction *see* N.H. CHIHA, TRAITÉ DE LA PROPRIÉTÉ IMMOBILIÈRE EN DROIT OTTOMAN 111 (1906).

42. 'Alī Haydar's commentary, *supra* note 41.

43. *See generally* M. KHADDURI, ISLAMIC LAW OF NATIONS 25 (1966).

44. 'Alī Haydar's commentary, *supra* note 41, art. 1270.

45. *Id.* This extremist position of Shaybani is typical of his purely theoretical approach to law, as contrasted with the more pragmatic approach of Abū Yūsuf, who was the first Chief Justice in Islam. Like Abū Yūsuf, Shaybani considered vivification as a mode of acquisition of land even where there is no prior authorization by the Sultan. *See* 2 C. CHEHATA, ÉTUDES DE DROIT MUSULMAN: LE CONCEPT DE PROPRIÉTÉ 120, 130, 136 n.1 (1973). However, unlike Abū Yūsuf, Shaybani paid no attention to the requirement of peace and order. For more about Abū Yūsuf's pragmatism as opposed to Shaybani's more systematic but less practical approach, *see* J. SCHACHT, ORIGINS OF MUHAMMADAN JURISPRUDENCE 303, 305, 307-8 (1959); Y. MERON, L'OBLIGATION ALIMENTAIRE ENTRE ÉPOUX EN DROIT MUSULMAN HANÉFITE 333-334 (1971).

46. 'Alī Haydar's commentary, *supra* note 41, at 295.

Despite the measures of taxation and police intervention to which it may be exposed, waste land is properly characterized as *res nullius*.[47]

IV. THE LEGAL STATUS OF WASTE LANDS IN THE MIDDLE EAST

A. *The Ottoman Land Law*

Before examining the potential repercussions of Article 6 of the British Mandate[48] on the status of waste land in Palestine, the author will review briefly the legal position of waste land in countries neighboring Judea and Samaria, which had also formed part of the Ottoman Empire, and thus entered the era following the First World War with the same Ottoman land legislation.[49] The only significant difference was the supplementary provision in Palestine represented by Article 6 of the Mandate.

1. The Lack of State Legal Capacity as an Impediment to State Ownership

The establishment of modern states in the Arab provinces of the former Ottoman Empire led to the elimination of one of the obstacles that had prevented state ownership of waste land during the period of Ottoman rule. Under Moslem law, the common law of the Ottoman Empire, the state did not have any legal capacity.[50] Therefore, it could not acquire any rights or assume any obligations in private law. It is clear that even in the absence of such provisions as Articles 1270-1280 of the *Mejelle*,[51] the Ottoman State could not have been vested with any rights in land. The lands which the Mandate describes as state lands were represented in Ottoman law as belonging to the

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47. "*Res nullius*" is a thing which has no owner. 2 BARWIER, LAW DICTIONARY 2915 (3rd ed. 1914). In Roman Law, the term also applied to immovable property. BERGER, ENCYCLOPEDIC DICTIONARY OF ROMAN LAW 679 (1953); LORD MACKENZIE, STUDIES IN ROMAN LAW 176 (4th ed. 1876) [hereinafter cited as LORD MACKENZIE]. The term applied not only to things which had never before been appropriated, but also to those which, though previously acquired, had ceased to belong to any one. LORD MACKENZIE, *id.* at 174. Besides land, there were three classical *res nullius* in Moslem law: water, grass, and fire. *Mejelle, supra* note 39, art. 1234.

48. British Mandate, *supra* note 3, art. 6.

49. The categories of land defined in the 1858 Ottoman Land Law are very much the same as those in the 1858 Egyptian Land Law, certainly as far as waste land is concerned. *See* G. BAER, A HISTORY OF LANDOWNERSHIP IN MODERN EGYPT 186 (1962). The common legal background resulted in similarities between the Ottoman and Egyptian Land Laws of 1858, although Egypt had enjoyed legislative autonomy ever since the beginning of the 19th century.

50. Moslem law recognizes the legal capacity of human beings only because they alone are gifted with reason. "*La capacité en droit musulman est ou n'est pas. Lorsqu'elle existe elle est totale. Lorsqu'elle disparait il y a incapacité également totale.*" C. CHEHATA, ÉTUDES DE DROIT MUSULMAN 150 (1971). Abstract bodies, which by nature are not gifted with reason do not have legal capacity. It was "impossible for corporations, native or foreign, to become owners of land since the juristic person was unknown to Ottoman law." F. GOADBY & M. DOUKHAN, THE LAND LAW OF PALESTINE 306 (1935) [hereinafter cited as GOADBY & DOUKHAN].

51. *Mejelle, supra* note 39, art. 1270-1280.

Treasury (*beyt ul-mal*).[52] Indeed, the name for State lands in Turkish was *miri,* an abbreviation of *Amiri* ("belonging to the Amir"), which refers to the Sultan. Thus, the reference to the Treasury was a euphemism, referring in fact to the Sultan's personal legal capacity.[53]

However, the non-existence of the state's legal capacity fails to provide a full explanation for the existence of waste land as *res nullius* in the Ottoman Empire. Indeed, the Sultan's personal legal capacity could have supplanted the missing legal capacity of the state. The ownership of waste land could have been characterized in the same way that ownership of *miri* land was attributed to the Amir. Under this approach, any legal distinction between state land and waste land would have disappeared.

2. The Requirement of an Act of Appropriation

In fact, ownership of waste land was never bestowed upon the Amir (governor) of the Ottoman Empire. An act of appropriation was required in order to vest the ownership of waste land in either an individual or a corporate entity such as a state.[54]

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52. Note that the distinction between the State Treasury and the Civil List was never clearly established in Ottoman law.

53. The distinct legal capacity of the state could, apparently, emerge progressively with the growing limitation of the Sultan's powers and prerogatives and particularly with the creation of a Civil List. In Sultan v. Attorney General [1947] 14 P.L.R. 115, the heirs of Sultan Abdul Hamid II exerted themselves very much to prove that property registered in approximately 1886 in the Land Register at Gaza in the Sultan's name was part of his "private property" and did not belong to the State. The Attorney General "filed a judgment dated [December 7, 1944] of the Court of Cassation" in Turkey "which upheld a decision that properties acquired by a Sultan during the term of his reign were not private properties but were imperial properties which vested in the Treasury." *Id.* at 127. The respondents maintained that this judgment was latter quashed. *Id.* The Supreme Court of Palestine upheld on this question the judgment of the trial judge who had accepted oral evidence to the effect that "the Civil List, which administered these properties, existed to administer the private properties of the Sultan," reaching the conclusion that "the property must be considered to have been held by the Sultan in his private capacity." *Id.* at 124. The Supreme Court upheld the judgment not without stating that the "Civil List is not a legal term" and citing the trial judge's observation that "[t]he evidence on this point, both oral and documentary, is very inconclusive." *Id.* All these statements are, however, no more than *obiter dicta,* because finally the heirs lost their case for other reasons. There seems to have been an administrative distinction between the Sultan's "private" properties and those "belonging" to the Treasury, but legally there was no distinction. A different conclusion is impossible for theoretical reasons. Moslem law recognizes no juristic persons other than human beings. *See* note 50 *supra.* Therefore, only an express provision by the (secular) legislator could invent a legal capacity for the State or for corporations. The earliest creations of juristic persons by the Ottoman legislator are found in the 1909 Ottoman Law on Associations, translated into French in A. BILIOTTI & A. SEDAD, LÉGISLATION OTTOMANE DEPUIS LE RÉTABLISSEMENT DE LA CONSTITUTION 295 (1912) and the 1913 Provisional Law Concerning the Right of Certain Corporate Bodies to own Immovable Property. Translated into English in R.C. TUTE, THE OTTOMAN LAND LAWS 165 (1927).

54. Land conquered by the Moslems becomes a religious endowment (*waqf*) dedicated to God under the theological theory of *fay'* (which meant "booty" in pre-Islamic times). This theory has

The act of appropriation could take the form of vivification of the waste land. This was the only mode of acquisition of waste land under Ottoman Law.[55] Modern States with legal capacity could also appropriate available waste land, not only through vivification, but also by registration in the Land Registry in the name of the State and by legislative action.[56] Without an act of appropriation, waste land could not become state land. This is consistent with the rule that an individual with legal capacity could not claim ownership of waste land before appropriating it through vivification.

B. *The Syrian Civil Code, The Egyptian Civil Code and the Jordanian Civil Code*

The Ottoman *Mejelle* was replaced in Syria by the Syrian Civil Code of May 18, 1949.[57] Waste land, "which belongs to nobody," is explicitly classified as "state property."[58] Egypt's Civil Code,[59] which entered into force on October 15, 1949, paralleled the draft Syrian Civil Code. Thus, an identical provision is found in the Egyptian Civil Code, in Article 874.[60] Although it retained the *Mejelle* and the 1858 Ottoman Land Law into the late 1960's, Israel also established state ownership of the waste lands as early as 1951. Article 3 of the 1951

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been used to support "the right of the state to heavy taxation," but it did not produce any legal effects, certainly not any limitations pertaining to the law of *waqf*. For example, this theory "does not exclude the right of inheritance." 4 *Encyclopedia of Islam* 863 (2nd ed. 1965). It is therefore totally irrelevant to the question of ownership of waste land.

In Maliki law, according to 5 KHARSHI COMMENTARY UPON AL-KHALIL, MUKHTASAR 69 (1317) and 4 SIDI AHMAD AL-DARDIR, AL-SHARH AL-KABIR 68 (1934) (printed in the margins of DUSUQI' HASHIYA), the idea of *fay'* seems to be used in order to deny full ownership to a person who vivified the land. However, even in Maliki law, it is yet to be shown how this theoretical assertion tallies with the provisions of positive law, for example in the field of succession.

The nature of "places where weeds grow and the summits of hills and the bottom of valleys" is a subject of discord between the Sunnite (orthodox) and the Shiite (heterodox) Moslem laws. According to the latter this kind of land continues to belong to the Prophet Mohammed himself, even after his death, much the same as the other *anfāl* property. *See* Afchar, *The Muslim Conception of Law,* II INT'L ENCYCLOPEDIA COMP. L. 100 (1973). However, neither Maliki nor Shiite law has even applied to land in Judea and Samaria.

55. Ottoman Land Law, art. 103. *See* ONGLEY translation, *supra* note 4, at 54-55.

56. *See* notes 144-148 and accompanying text *infra*.

57. SYRIAN CIVIL CODE OF MAY 18, 1949. The text is translated into French in V. SYRIANI, RECUEIL DES LOIS ET DE LA LÉGISLATION FINANCIÈRE DE LA RÉPUBLIQUE ARABE SYRIENNE, Supp. No. 2 (1949).

58. SYRIAN CIVIL CODE OF MAY 18, 1949, art. 832.

59. EGYPTIAN CIVIL CODE OF OCTOBER 15, 1949. The text is translated into English in PERROT, FANNER & S. MARSHALL, THE EGYPTIAN CIVIL CODE (1952).

60. EGYPTIAN CIVIL CODE OF OCTOBER 15, 1949, art. 874. It may be that this article merely reproduces the tenor of article 538 of the French Civil Code: *"Toutes les portions de territoire français que ne sont susceptibles d'une propriété privée sont considéréés comme les dependances du domaine public."* CODE CIVIL art. 538 (Dalloz ed. 1968). As for Iraq, *see* Wahab, *The Legal Position of Tribes in Iraq with reference to the Customary Law, Government Policies and the Law of the Land* (1960) (Ph.D. thesis), *cited in* Hill, *The Comparative and Historical Study of Modern Middle Eastern Law,* 26 AM. J. COMP. L. 279, 291 n.46 (1978).

State Property Law[61] states: "Ownerless immovable property in Israel is property of the State of Israel as from the day of its becoming ownerless or as from the 6th *Iyar* 5708 (15th May, 1948), whichever is the later date."[62]

As of June 6, 1967, Jordanian law did not contain any similar provision.[63] Even in Syria and Egypt, where the 1949 Civil Code had clearly established state ownership of waste land, the Moslem law principle of individual appropriation of waste land remained in force for some time after the land was officially appropriated by the state.[64]

The Syrian Decree No. 135 of 1952 provided that waste land would be managed by the Directorate of State Property.[65] Prescription[66] does not apply to waste land so that occupation prior to the enactment of Decree No. 135 does not confer any right of possession (*tasarruf*). However, Decree No. 135 did establish that persons who had occupied waste land had a right of possession, provided the area did not exceed 200 hectares for each person and for each of his wives and children.[67]

Similarly in 1957, Egypt abolished the right to acquire real property by prescription against the state.[68] However, the 1957 Law had no retroactive effect against those who had acquired rights prior to its enactment. The state

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61. State Property Law of 1951, 5 LAWS OF THE STATE OF ISRAEL 45 (1950-51).

62. *Id.* art. 3. The word "immovable" was added by article 14 of the Movable Property Law of 1971, 25 LAWS OF THE STATE OF ISRAEL, 175, 177 (1970-71).

63. The following provision came into force on January 1, 1977 in Article 1880 of the Jordanian Civil Code: "Mewat lands and those lands with no owner are owned by the State; the ownership and possession of these lands cannot be acquired except by the permission of the Government in accordance with the law." JORDANIAN CIVIL CODE OF 1977, art. 1880. *See* F.J. ZIADEH, PROPERTY LAW IN THE ARAB WORLD 37-38 (1979). This provision has no bearing on the legal position of these lands prior to the promulgation of the JORDANIAN CIVIL CODE of 1977 and certainly not on lands in Judea and Samaria which at that time were no longer within the frontiers of Jordan.

64. *See* note 41 *supra.*

65. Subjection of Waste Land to the Directorate of State Property, Decree No. 135 (Oct. 29, 1952), OFFICIAL GAZETTE OF THE REPUBLIC OF SYRIA, No. 64 at 4534 (Nov. 3, 1952). A non-juridical English translation appears in 7 THE MIDDLE EAST JOURNAL 69 (1953).

66. Prescription is a mode of acquiring ownership or lessor rights through long-continued enjoyment. W.J. BYRNE, A DICTIONARY OF ENGLISH LAW 693 (1923). Although Moslem law did not know of it, this concept was innovated in the 16th century in the Ottoman Empire, Schacht, *Problems of Modern Islamic Legislation,* XII STUDIA ISLAMICA, 99, 102-103 (1960), and was incorporated in the 19th century in articles 1660-1675 of the *Mejelle, supra* note 39, art. 1660-1675. International Law recognizes prescription as a mode of acquisition. VON GLAHN, LAW AMONG NATIONS 277-79 (2nd ed. 1970), M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1062-1084 (1963).

67. Subjection of Waste Land to the Directorate of State Property, Decree No. 135 (Oct. 29, 1952), OFFICIAL GAZETTE OF THE REPUBLIC OF SYRIA, No. 64, at 4534 (Nov. 3, 1952).

68. EGYPTIAN CIVIL CODE, art. 970, *as amended by* Law No. 147 of 1957. This law is discussed by: ABD AL-RAZAQ AL-SANHOURI, AL-WASIT FI SHARH AL-QANUN AL-WATANI: HAQQ AL-MULKIYYA 168 (1968) [hereinafter cited as AL-SANHOURI]; ABD AL-MUN'IM AL-BADRAWI, AL-HUQUQ AL-AYNIYA AL-ASLIYA, 73 (3rd ed. 1968).

was empowered to dislodge any person occupying its land by administrative measures and without recourse to the courts.[69] Further, Egyptian Law No. 100 of 1964[70] repealed part of Article 874 of the Egyptian Civil Code, and thus abolished the potential appropriation of state land by individuals.[71]

A somewhat similar step in the same direction has been taken by the Jordanian legislature in the Possession of Immovable Property Law of 1953.[72] Article 16(1) of this Law, governing actions to which the state is a party, extends the period of prescription in claims against the Government for the ownership (*raqabe*) of state lands to thirty-six years.[73] It is clear from this provision that, in Jordan, waste land does not form part of state lands. Article 16(1) enumerates the kinds of land to which it applies.[74] Significantly, waste land is not mentioned in this list. That waste land is distinct from state lands is confirmed by the examination of the 1858 Ottoman Land Law[75] and the *Mejelle*,[76] both of which remained in effect through June 6, 1967, when Israeli forces entered Judea and Samaria.

V. WASTE LAND UNDER INTERNATIONAL LAW

Extensions of private law concepts have been used to provide justifications under international law for assertions of territorial sovereignty made in the name of ethnic groups as peoples. Claims for territory have been asserted on behalf of states, entities or even pseudo-entities. In many cases the relationship of these claimants to the land is very remote. In some instances it is nonexistent.

A. *The Western Sahara Advisory Opinion*[77]

In the *Western Sahara* advisory opinion, the International Court of Justice rejected Spain's submission that the Western Sahara had been *terra nullius* at the time of its colonization. The Court based its opinion on the fact that "the State practice of the relevant period indicates that territories inhabited by tribes . . .

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69. AL-SANHOURI, *supra* note 68, at 169.

70. Egyptian Law No. 100 (1964).

71. AL-SANHOURI, *supra* note 68, at 176. *See also* Ziadeh, *Law of Property in Egypt: Real Rights* 26 AM. J. COMP. L. 239, 253 (1978).

72. Possession of Immovable Property Law of 1953, JORDANIAN OFFICIAL GAZETTE No. 1135 (Mar. 1, 1953) at 577.

73. *Id.* art. 16(1).

74. *Id. Miri* (state land), *mawqufa* (state lands, certain rights in which are dedicated to a Moslem endowment (*waqf*)), *mahlul* (state lands which reverted wholly to state ownership because the rights of individuals in them have expired).

75. *See* Ottoman Land Law. *See* ONGLEY translation, *supra* note 4, at 3, 6, 54, 55, 57-58.

76. *See Mejelle, supra* note 39, arts. 1270-1280.

77. Advisory Opinion on the Western Sahara, [1975] I.C.J. 12.

were not regarded as *terra nullius*."[78] Spain had concluded protection agreements with tribes in the area at the time of its colonization. The Court noted that *terra nullius* needs no protection.[79] In this instance, the mere presence of nomad tribes in a desert was held to be sufficient to preclude the characterization of the land as *terra nullius*. Nonetheless, nomadic tribes cannot constitute an entity unless they share common social and political institutions. The Court reiterated this principle through the consideration of Mauritania's claim that a Mauritanian "entity" had existed prior to Mauritania's establishment as a sovereign State.[80] However, neither of these solutions addresses the nature of the relationship, if any, between the nomad tribes and the waste land on which they wander.

Even a full-fledged state such as Morocco was not required to establish itself on a specific territory. The International Court of Justice readily admitted that in the 19th century, Morocco "was founded on the common religious bond of Islam existing among the peoples and on the allegiance of various tribes to the Sultan through their *caids* or *sheikhs, rather than on the notion of territory.*"[81] [Emphasis supplied]. According to the Court, "[t]he tribe had its own customary law applicable in conjunction with the Koranic law."[82] The Court had noted earlier that "[A]ll the tribes were of Islamic faith and *the whole territory lay within Dār al-Islām.*"[83] [Emphasis supplied]. The inclusion of territory as an element of *Dār al-Islām* is inappropriate, as the definition of *Dār al-Islām* in Moslem law is essentially spiritual rather than territorial.[84] According to Abu Yusuf,[85] and his contemporary Al-Shaybani,[86] the laws which apply in a country determine whether or not it belongs to *Dār al-Islām*. If the laws are Moslem, the country belongs to *Dār al-Islām*. Otherwise it is *Dār al-Harb* (the Abode of War), or, according to the classical jurist, Al-Kasani,[87] *Dār al-kufr* (the abode of Infidelity).

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78. *Id.* at 39, § 80.

79. *Id.* at 124 (opinion of Dillard, J.). *See id.* at 105 (opinion of Pétrén, J.); *id.* at 171 (opinion of de Castro, J.).

80. *Id.* at 163, § 149.

81. *Id.* at 44, § 94.

82. *Id.* at 42, § 88.

83. *Id.* Judge Fouad Amon, who sided more than his colleagues with Morocco, laid stress on the nomination by the Sultan of Kadis who applied Moslem law and the help given by the tribes to holy wars led by the Sultan. On the other hand, Judge de Castro, who went furthest in belittling the case of Morocco, was of the opinion that "[b]elonging to *Dār al-Islām* is a powerful tie; the world of the Moslem believers is opposed to that of the unbelievers (*Dār al-Harb*), an opposition which justifies the call for mutual help in cases of a holy war (*jihād*). It is a tie which is not to be confused with legal or political ties." *Id.* at 148.

84. *See generally,* M. KHADURI, ISLAMIC LAW OF NATIONS 130-141 (1966).

85. *Id.* at 23-50.

86. *Id.* at 27.

87. KASANI, 7 KITAB BADĀ'I 'AL-SANĀ'I '131 (1910). Sheikh Abu Zahra bases his study of the

Al-Kasani interpreted the view of Abū Hanīfa as imposing two additional criteria: first, that a country belonging to the Abode of War border on *Dār al-Islām* and second, that it fail to offer security to Moslem inhabitants. Thus, the reference to territory is found only in Abū Hanīfa's opinion. It is clear that this view has not prevailed in Moslem Law.[88]

Without analyzing these details, the International Court of Justice looked for political ties of allegiance within *Dār al-Islām,*[89] rather than for mere religious affiliation. Due to "the paucity of evidence of unambiguous display of authority with respect to Western Sahara,"[90] the Court set aside most of Morocco's claim to Western Sahara. Thus, in determining the destiny of this territory, the Court relied upon the relations between men rather than their rights in land.

While any consideration of rights in land was excluded from the Advisory Opinion, the Opinion employs the expression "to belong" in the context of sovereignty, even though state sovereignty "is absolutely not connected with ownership."[91] This was not the only deviation by the Court from the standards of international law. In this case "Morocco and Mauritania advocated a concept of 'territory' which is very far removed from the classical concept of territory."[92] The question concerns the Moslem concept, and more precisely

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theory of war in Islam on this authority. Zahra, *The Theory of War in Islam*, REVUE EGYPTIENNE DE DROIT INTERNATIONAL 1 (1958).

88. Meron, Book Review (M.T. AL-GHUNAIMI, MUSLIM CONCEPTION OF INTERNATIONAL LAW — IS IT FEASIBLE TODAY?), 7 ISRAEL L.R. 578, 584 n.8 (1972). It may be argued that the whole debate between Abū Hanīfa and his disciples Abū Yūsuf and Al-Shaybani is irrelevant to Morocco, where Hanafi Moslem law never applied. The view of Hanafi Moslem law is nevertheless of interest, not only because it reigned supreme in the major part of the Moslem world (the Ottoman and Moghul Empires), but also because Algeria, formerly part of the Ottoman Empire, is a party to the dispute concerning Western Sahara. Moreover, Moslem Maliki law which officially applied in Morocco, seems to be not very far, on this point, from Hanafi Moslem law. Moslem Maliki law also upholds the distinction between Dār al-Islām and Dār al-Harb. *See* the chapter on the Holy War (*jihād*) in AL-KHĀLIL MUKHTASAR (1317); 1 KHĀLIL ABD-ISHAK, PRÉCIS DE JURISPRUDENCE MUSULMANE OU PRINCIPES DE LÉGISLATION MUSULMANE CIVILE ET RELIGIEUSE SELON LE RITE MALÉKITE, (M. Perron trans. 1852) [hereinafter cited as Perron]. The spiritual definition of Dār al-Islām is found also in Maliki law, and leave from the Sultan is also a prerequisite for acquisition of land by way of vivification. *See* 2 Perron, *id.*, at 269; M. WORMS, RECHERCHES SUR LA CONSTITUTION DE LA PROPRIÉTÉ TERRITORIALE DANS LES PAYS MUSULMANS ET SUBSIDIAIREMENT EN ALGÉRIE, 178-79 (1846) (basing himself upon the 17th century commentator, Abd al-Baqi Al-Zurqani, who elaborated upon the *Mukhtasar* of Khālil (died 1442)). However, in Maliki law too, the Sultan's "leave" is not necessary for the vivification of land which is distant from an inhabited area. 5 Perron, *supra* at 10, 11.

89. Advisory Opinion on the Western Sahara, [1975] I.C.J. 12, 44, § 95.

90. *Id.* at 43, § 99.

91. Prévost, *Observations sur l'avis consultatif de la Cour Internationale de Justice relatif au Sahara occidental ("terra nullius" et auto-détermination)* 103 J. DROIT INT'L 831, 848 (1976) [hereinafter cited as Prévost].

92. *Id.* at 842. *Cf.* M. SORENSON, MANUAL OF PUBLIC INTERNATIONAL LAW, 315 (1968).

the Arab notion, of state. Such an inquiry lacks precise geographical data.[93] Judiciously, Prévost observed that "the Court recognize[d] implicitly that at the end of the last century sovereign states were not the only subjects of international law," and that it was equally necessary to consider as subjects those territories inhabited by tribes or peoples possessing a common social and political organization.[94]

In order to overcome this irregularity Prévost resorts to the "application of principles of intertemporal law" and to interpretation of the notion of *"terra nullius"* having regard to the evolution of international law. Following the reasoning set forth by Max Huber in the *Island of Palmas* arbitral award[95] and the subsequent commentary by the French representative Gros in the case of the *Minquiers and Ecrehos,*[96] Prévost suggests that it is appropriate to examine whether Western Sahara was *terra nullius* at the time of its colonization by Spain according to the law applicable at that time, whereas, he suggests, any rights created subsequent to that time should be examined under the law in force at the present time.[97]

B. *Arab Territorial Assertions*

Although this analysis examines waste land under both former Moslem law and contemporary positive law, Prévost's suggestion is inapplicable due to the persistence of old ideas which parties to the Middle East conflict try to apply. During the course of the Lausanne peace talks[98] in 1949 the Israeli government proposed to take back 100,000 Arab refugees. In their reply on August 15, 1949, the Arab Governments claimed compensation in the form of Israeli territory for those refugees who would choose not to return.[99] The claim of territory for refugees in 1949 was not restricted to any particular category of land. Subsequently, the Arab Governments reformulated the demand in April 1966, to apply solely to government land. Since a large proportion of the land

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93. Prévost, *supra* note 91, at 842. *"Il s'agit de la conception musulmane, et plus précisément de la notion arabe du territoire. Selon cette conception le territoire n'est pas lié à la notion d'État et échappe à des données géographiques précises."* *Id.*

94. *Id.* at 848.

95. Island of Palmas case (United States v. Netherlands), 2 R. Int'l Arb. Awards 845 (1928).

96. Oral argument of France, 2 Minquiers & Ecrehos case, I.C.J. Pleadings 375 (1953).

97. Prévost, *supra* note 91, at 846.

98. The Lausanne peace talks were held in 1949 under the auspices of the United Nations Conciliation Commission for Palestine. 1949 Y.B.U.N. 198. The text of the protocal is *reprinted in* 2 M. KHALIL, THE ARAB STATES AND THE ARAB LEAGUE 607 (1962).

99. DAVID P. FORSYTHE, UNITED NATIONS PEACEMAKING, THE CONCILIATION COMMISSION FOR PALESTINE 57 (1972) [hereinafter cited as Forsythe]. In U.N. DOC. A/AC. 25/W. 82/Rev. 1, 11, the same idea is formulated as follows: "the Arab delegations favored compensation in kind for the refugees who might not return to their homes; this indemnification might take the form of territorial compensation . . ."

in Palestine belonged to the Government, the Arab Governments claimed that it should revert to the population. The Arab Governments argued that the Arabs were the majority in Palestine in 1947 and "had a right to that property in direct proportion to their numerical strength in 1947."[100] Echoes of the same approach still resounded in an August 1977 statement made by President Assad of Syria on the extent of the Israeli withdrawal claimed by Syria:

> I mean withdrawal from the territories occupied since 1967 and the implementation of the U.N. resolution . . . I have in mind also that the total area of the West Bank in 5,000 square kilometers, which cannot absorb three million people. But the area of Israel is 20,000 kilometers and it can.[101]

C. *Implications in Inter-Arab Relations*

According to the officially enunciated Arab position, territory can be claimed by entities other than states.[102] Thus, groups of refugees may assert claims for land in direct relation to their numerical strength. Inter-Arab relations occasionally reveal remarkable implications of this viewpoint. One example is the apparent detachment with which certain territories are treated. According to the 1965 Boundary Agreement between Jordan and Saudi Arabia,[103] any rights, interests and income derived from oil which may be discovered in the border region, are to be shared equally between the two states. The apparent accommodation evidenced by this arrangement is explained through consideration of the legal framework within which it arose. As previously noted,[104] Article 107 of the 1858 Ottoman Land Law provides that only one-fifth of the minerals found in waste land (*mewat*) belongs to the Treasury of the state. Thus, neither of the two contracting states conceded anything to

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100. Forsythe, *supra* note 99, at 119.

101. N.Y. Times, Aug. 28, 1977. This Arab line of argumentation benefits Israel no less than the Arabs. This is so because a million Jews, whose uninterrupted presence in countries of the Middle East predates that of the Arabs, have been dislodged from the Arab countries mostly towards Israel. President Assad did not divulge what size of an area is sufficient to absorb them. *See generally,* N. STILLMAN, THE JEWS OF ARAB LANDS (1979); Meron, *The "Complicating" Element of the Arab-Israeli Conflict,* INDIAN SOCIO-LEGAL JOURNAL 1 (1977). This article surveys the legislation in the Arab countries as well as the historical data leading to the dislodgement of the Jews from the Arab countries.

102. Al-Siyasa, Nov. 9, 1978. "I told him, you, Begin, do not have a right to the West Bank and Gaza, and neither does Hussein . . . *Sovereignty is the right of those who own the land.* The Palestinians own the land in the West Bank, and they also own the land in Gaza. I told them this. Underline it." (Emphasis added). (President Sadat, in an interview to the Kuwaiti newspaper "Al-Siyasa" on November 9, 1978, as reported from Cairo by the Middle East News Agency on November 13, 1978.

103. Boundary Agreement of 1965, Text and Ratifying Law in JORDANIAN OFFICIAL GAZETTE No. 1868, Aug. 26, 1965, at 1401 [hereinafter cited as Border Agreement]; Exchange of Instruments of Ratification in JORDANIAN OFFICIAL GAZETTE, No. 1885, Nov. 10, 1965, at 1867.

104. Ottoman Land Law, art. 107. *See* ONGLEY translation, *supra* note 4, at 57-58.

the other by appropriating half of the income from the eventual discovery of oil. Both Jordan and Saudi Arabia merely augmented their shares by three-tenths, *i.e.*, from one-fifth to one-half. The Border Agreement further permits the regional nomad tribes to have access to their grazing areas and water points.[105] Tribes crossing the Saudi-Jordanian border are subject to the laws and regulations of the host state, but only to the extent that the laws do not conflict with grazing rights.[106] Under the Border Agreement, subjects of both states and their goods, imported or exported by way of transit, are exempt from all taxes and customs.[107]

D. *Customary International Law*

The loose grip over waste land held by Arab states reflects upon the political and legal structure of those states. "[E]ffective control of the territory in question . . . is an element of title which is of central importance for purposes of both the acquisition and *maintenance of title.*"[108] [Emphasis supplied]. Although little evidence of the actual exercise of sovereign rights is required where claims to sovereignty relate to thinly populated or unsettled areas,[109] it remains true that "[i]nternational law . . . cannot be presumed to reduce a right such as territorial sovereignty . . . to the category of an abstract right without concrete manifestation."[110]

Further, international law in the nineteenth century reflected the eighteenth century theory that claims to territorial sovereignty based upon occupation must "offer certain guarantees to other States and their nationals."[111] From the perspective of international law, occupation of a territory bestows rights only if some visible measure of control is exercised over certain portions of the land.[112] Occupation in this context implies effectiveness, consisting of possession and administrative control over territory in the name of the acquiring state.

Where a governmental administration effectively controls land through the supervision of private and state ownership of land, the requirement of effective occupation under international law is satisfied. However, where the law of a

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105. Border Agreement, *supra* note 102, art. 3(a). For a study of a boundary based upon a similar treaty between Egypt and the Sudan, *see* S. SHARMA, INTERNATIONAL BOUNDARY DISPUTES AND INTERNATIONAL LAW 114-116, 191-194 (1976).

106. Border Agreement, *supra* note 102.

107. *Id.* art. 3(b).

108. G. SCHWARZENBERGER, INTERNATIONAL LAW 298 (3rd ed. 1957) [hereinafter cited as SCHWARZENBERGER].

109. *Id.* at 83.

110. Island of Palmas Case (United States v. Netherlands), 2 R. Int'l Arb. Awards 839 (1928).

111. *Id.* at 845-846. *See* SCHWARZENBERGER, *supra* note 108, at 82-83.

112. Prévost, *supra* note 91, at 843.

state practically disassociates its government from the administration of waste lands, it may be asserted that insufficient control is exercised to bring the lands within the state's sovereignty. In the absence of state sovereignty over waste lands, there is a temptation to recognize subjects of international law other than states. This approach was adopted in the *Western Sahara* advisory opinion.[113]

Terra nullius in international law may thus be considered the corollary of waste land in Moslem law. As stated by Prévost, the notion of territory without master was conceived in order to justify colonial enterprises. According to him, "the notion of *terra nullius,* applied to the hypothesis of a colonial acquisition and within the framework of the law of the period, cannot be rejected."[114] However, waste land is a well-defined category in Moslem private law,[115] which is consistent with a basic characteristic of Moslem international law: "The concept of territorial sovereignty does not exist, in the precise meaning of this expression, in Moslem law."[116] "Territorial sovereignty was confused and not distinguished from the right of property."[117] "The element of territory did not play a decisive role in the conception of the State."[118] Because Arab society was originally nomadic,[119] the political organization in Islam (*Umma*) took the form of inter-tribal alliances. Thus, Moslem law did not officially recognize the concept of a territorial basis[120] and "the Muslims, irrespective of their residence, are regarded as citizens of the Islamic state and subjected to the Islamic rule."[121]

Therefore, waste land is a facet of the Moslem state. The Ottoman Empire, which until 1918, stretched also over Judea and Samaria, was such a state.

E. *The Mewat Land Ordinance*

In anticipation of the subsequent ratification and entry into force of Article 6 of the British Mandate,[122] the newly established Civil Administration in Palestine attempted to promote preservation of the waste lands through the is-

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113. *See* text accompanying note 76.
114. Prévost, *supra* note 91, at 843.
115. *See* § II, *supra.*
116. Flory, *La notion de territoire Arabe et son application au problème du Sahara* [1957] ANNUARIE FRANÇAIS DE DROIT INTERNATIONAL 73, 84. *See* Prévost, *supra* note 91, at 842.
117. E. FODAY, THE PROJECTED ARAB COURT OF JUSTICE 112 (1957).
118. MUHAMMAD TALAAT AL-GHUNAIMI, THE MUSLIM CONCEPTION OF INTERNATIONAL LAW AND THE WESTERN APPROACH 187 (1968).
119. *Id.* at 63-65.
120. *Id.* at 65.
121. *Id.* at 186.
122. British Mandate, *supra* note 3, art. 6.

suance of the *Mewat* Land Ordinance.[123] This provision was intended to replace the last paragraph of Article 103 of the Ottoman Land Law:[124]

> Any person who without obtaining the consent of the Administration breaks up or cultivates any Waste Land shall obtain no right to a title deed for such land and further be liable to be prosecuted for trespass. (b) Any person who has already cultivated such waste land without obtaining authorization shall notify the Registrar of the Land Registry within two months of the publication of this Ordinance and apply for a title deed. 16th February, 1921.[125]

This Ordinance accommodated the former practice of individual appropriation of waste land through unofficial cultivation without prior "leave" from the authorities.[126] This practice developed despite the fact that the requirement to obtain such "leave" had existed in the Ottoman Empire at least since the enactment of Article 103 of the Ottoman Land Law.[127]

Moreover, the amendment of this article in the *Mewat* Land Ordinance in no way affected the legal nature of waste land. According to the 1858 Ottoman Land Law, waste land is defined as "land which is not in the possession of anybody"[128] and "not in the possession of anybody by title deed."[129] The validity of these definitions was not affected by the *Mewat* Land Ordinance.[130] The distinction between waste land and state land also remained valid, because it was only with regard to the latter that the legal ownership was vested in the Treasury.[131]

Finally, certain writers[132] have interpreted the 1922 Palestine Order-in-Council[133] so as to deny the vesting of the *raqabe*[134] in the High Commissioner. This interpretation cannot be reconciled with the language of Article 12(1) of the 1922 Palestine Order-in-Council: "All rights in or in relation to any public

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123. *Mewat* Land Ordinance, *supra* note 26.

124. Ottoman Land Law, art. 103. *See* ONGLEY translation, *supra* note 4, at 54-55.

125. *Mewat* Land Ordinance, *supra note 26, reprinted in,* R.H. DRAYTON, THE LAWS OF PALESTINE 852 (1934).

126. The *Mewat* Land Ordinance, *supra* note 26, was intended to prevent trespass by unauthorized individuals subsequent to its ratification. The Ordinance did not succeed in this regard. AREF EL-AREF, KITAB AL-QADA BYAN-A AL-BADW 235 (1953). For a discussion of the shortcomings in the application of this ordinance, *see infra* note 215.

127. Ottoman Land Law, art. 103. *See* ONGLEY translation, *supra* note 4, at 54-55.

128. Ottoman Land Law, art. 6. *See* ONGLEY translation, *supra* note 4, at 6.

129. Ottoman Land Law, art. 103. *See* ONGLEY translation, *supra* note 4, at 54-55.

130. *Mewat* Land Ordinance, *supra* note 26.

131. Ottoman Land Law, art. 3. *See* ONGLEY translation, *supra* note 4, at 3.

132. *See, e.g.,* GOADBY & DOUKHAN, *supra* note 50, at 61.

133. Palestine Order-in-Council of 1922, *reprinted in* 2 M. DOUKHAN, LAWS OF PALESTINE, 1918-1925, at 420 (1934).

134. *Raqabe* is Turkish for "legal ownership." *See* FISHER, *supra* note 25.

lands shall vest in and may be exercised by the High Commissioner for the time being in trust for the Government of Palestine."[135]

However, if the words "all rights . . . shall vest in" are not sufficient to convey to the Government of Palestine the legal ownership of state lands,[136] it is certain, *a fortiori,* that they could not confer the legal ownership of waste lands upon the Government of Palestine. This interpretation conforms with Article 2 of the 1922 Palestine Order-in-Council, which defines "public lands" as follows: "Public lands means all lands in Palestine which are subject to the control of the Government of Palestine by virtue of Treaty, convention, agreement or succession, and all lands which are or shall be acquired for the public service or otherwise "[137]

Waste land is not included in this definition because no treaty, convention, agreement or succession bestowed the control of this land upon the Government of Palestine. The control, as opposed to ownership, over waste land was conferred upon the Government only by virtue of its own legislation, *i.e.,* the 1921 *Mewat* Land Ordinance.[138] Thereby, for the first time since the Moslem conquest of the territory, waste land came under the *exclusive* control of a government.

It is clear from the Treaty of Peace (Turkey) Amendment Ordinance of 1925[139] that Article 12 of the 1922 Palestine Order-in-Council[140] did not convey to the Government of Palestine all of the property and possessions of the Ottoman Empire. Article 60 of the Treaty of Lausanne[141] provided that states acquiring territory separated from the Ottoman Empire by the Treaty would acquire without payment all the property and possessions of the Ottoman Empire situated therein.[142] Waste land was not included in this definition because

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135. Palestine Order-in-Council of 1922, art. 12(1), *reprinted in* 2 M. DOUKHAN, LAWS OF PALESTINE, 1918-1925, at 424 (1934).

136. Such a view is taken by Goadby and Doukhan. *See* GOADBY & DOUKHAN, *supra* note 50 at 61. This view is apparently vindicated by Article 3 of the 1933 Land Law (Amendment) Ordinance, which states that only by order "under the hand of the High Commissioner" can "any *miri* land which is or may become *mahlul* under the provisions of the Land Law" be declared "to be public land within the meaning of paragraph (1) of Article 12 of the Palestine Order-in-Council, 1922." Land Law (Amendment) Ordinance of 1933, PALESTINE GAZETTE, No. 383, art. 3 (Aug. 24, 1933). *See* R.H. DRAYTON, THE LAWS OF PALESTINE 849 (1934) [hereinafter cited as Drayton].

137. Palestine Order-in-Council of 1922, art. 2, *reprinted in* 2 M. DOUKHAN, LAWS OF PALESTINE, 1918-1925, at 420 (1934).

138. *Mewat* Land Ordinance, *supra* note 26.

139. Treaty of Peace (Turkey) Amendment Ordinance of 1925, No. 28, *reprinted in* 1 N. BENTWICH, LEGISLATION OF PALESTINE, 1918-1925, at 576 (1926).

140. Palestine Order-in-Council of 1922, art. 12, *reprinted in* 2 M. DOUKHAN, LAWS OF PALESTINE, 1918-1925, at 424 (1934).

141. Treaty of Lausanne, July 24, 1923, art. 60, 28 L.N.T.S. 12.

142. *Id.*

it had never been part of the property or possessions of the Ottoman Empire.

Therefore, waste land remained *res nullius*. However, this land was subject to the new control introduced by the 1921 *Mewat* Land Ordinance.[143]

VI. LEGAL STATUS OF WASTE LAND UNDER THE BRITISH MANDATE

A. *Appropriation of Waste Land*

No legislative act under the British Mandate modified the legal nature of waste land. Nonetheless, specific tracts of waste land could become state land through appropriation. As indicated *supra*,[144] waste land could be appropriated through registration in the Land Registry. Section 28(3),[145] inserted in 1930 into the 1928 Land Settlement Ordinance[146] provided: "All rights to land in any settlement area which are not established by any claimant and registered in accordance with the settlement shall be registered in the name of the Government."[147] As amended in 1939, Section 29 read: "The rights of the Government in land shall be investigated and settled whether they are formally claimed or not. All rights to land which are not established by any claimant shall be registered in the name of the High Commissioner in trust for the Government of Palestine."[148]

Vivification, a mode of appropriation which had been available under the Ottoman Empire to individuals, was, under the British Mandate, at the disposal of the State. Vivification through afforestation, for example, permitted the registration of former waste land as state land (*miri*) under Article 103 of the 1858 Ottoman Land Law.[149] This is supported by the fact that forests are state lands, according to the definition in Article 3 of the Ottoman Land Law.[150] A "Public Notice" published on November 10, 1921, appears to follow this reasoning:

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143. *Mewat* Land Ordinance, *supra* note 26.

144. *See* text accompanying note 56, *supra*.

145. Land Settlement (Amendment) Ordinance of 1930, OFFICIAL GAZETTE OF THE GOVERNMENT OF PALESTINE, No. 259, Supp. No. 12, art. 28(3) (May 23, 1930) (amending Land Settlement Ordinance of 1928, OFFICIAL GAZETTE OF THE GOVERNMENT OF PALESTINE, No. 212, § 28(3) (June 1, 1928)).

146. Land Settlement Ordinance of 1928, OFFICIAL GAZETTE OF THE GOVERNMENT OF PALESTINE, No. 212 (June 1, 1928). *See* DRAYTON, *supra* note 134, at 864.

147. Land Settlement (Amendment) Ordinance of 1930, OFFICIAL GAZETTE OF THE GOVERNMENT OF PALESTINE, No. 259, Supp. No. 12, art. 28(3) (May 23, 1930).

148. Land (Settlement of Title) (Amendment) Ordinance of 1939, PALESTINE GAZETTE, No. 964, Supp. No. 1, art. 29 (Nov. 23, 1939) (amending Land Settlement Ordinance of 1928, OFFICIAL GAZETTE OF THE GOVERNMENT OF PALESTINE, No. 212, art. 28 (June 1, 1928)).

149. Ottoman Land Law, art. 103. *See* ONGLEY translation, *supra* note 4, at 54-55.

150. Ottoman Land Law, art. 3. *See* ONGLEY translation, *supra* note 4, at 3.

PUBLIC NOTICE
DEMARCATION OF GOVERNMENT LANDS

Notice is hereby given that:

1. In order to ascertain and demarcate unused Government Lands with a view to securing the cultivation and afforestation thereof, the Demarcation Commissions constituted under the Woods and Forests Ordinance 1920 by order published in the Official Gazette dated 15th November 1920, will hence demarcate:
   (a) *Mewat* lands.
   (b) *Mahlul* lands.
   (c) Lands subject to the rights of *Tapu (Mustehiki Tapu).*
   (d) Any other Government lands.[151]

In view of the control, but not the ownership, by the Government of waste lands that was established nine months earlier by the *Mewat* Land Ordinance,[152] the reference to these lands as "Government Lands" is not surprising. However, this reference in a Public Notice could not modify the legal nature of the waste lands any more than the *Mewat* Land Ordinance[153] could. On the contrary, a Public Notice could, at most, declare an Ottoman law enacted after November 1, 1914 to be "in force," as stated in Article 46 of the 1922 Palestine Order-in-Council.[154] The publication of a Public Notice was not the proper vehicle for the repeal or amendment of any Ottoman law, especially with regard to Ottoman laws enacted prior to November 1, 1914. If only because of this constitutional consideration, any assertion that this Public Notice appropriated waste lands to the state is not supportable.[155] Indeed, the Jordanian legislature in its 1953 Possession of Immovable Property Law,[156] made it quite clear that waste land does not constitute state land.[157] There is little doubt that the Jordanian Legislature is correct.

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151. Demarcation of Public Lands, Public Notice, ORDINANCES AND PUBLIC NOTICES (issued between Oct. 14 and Dec. 31, 1921), (Nov. 10, 1921) [hereinafter cited as Public Notice]. *See* the reference to *mahlul* land in the Ottoman Land Law, art. 59. *See* ONGLEY translation, *supra* note 4, at 31.

152. *Mewat* Land Ordinance, *supra* note 26.

153. *Id. See* text accompanying note 123 *supra.*

154. Palestine Order-in-Council of 1922, art. 46, *reprinted in* 2 M. DOUKHAN, LAWS OF PALESTINE, 1918-1925, at 430 (1934).

155. Goadby and Doukhan, who in 1935, noted that the state did own *miri* land (*see* text accompanying note 129 *supra*) and therefore did not own *mahlul* land (*see* text accompanying note 134 *supra*) must have been in agreement with the author's interpretation of the Public Notice, *see* note 148 *supra,* because in the Public Notice *mahlul* land appears on an equal footing with *mewat* (waste) land. GOADBY & DOUKHAN, *supra* note 50, at 61.

156. Possession of Immovable Property Law, JORDANIAN OFFICIAL GAZETTE No. 1135, Mar. 1, 1953, at 577.

157. *Id.*

Shortly after the enactment of the 1951 Israeli State Property Law,[158] a new edition of an old book[159] argued that waste land belonged to the state even in Ottoman times. The author, the late Doukhan, who had described waste land in the first edition of his book as *res nullius* (in Hebrew: *hefquer*)[160] admitted in the later edition that "in Ottoman law there is no express provision concerning State ownership of waste land."[161] In 1925 Doukhan concluded that these lands "are considered as belonging to the Government"[162] on the sole authority of the Public Notice of December 1, 1921. As discussed *supra*,[163] this reasoning is very illusory. In 1953, Doukhan vaguely asserted that state ownership is implicit in Article 103 of the 1858 Ottoman Land Law[164] and in Article 1272 of the *Mejelle*.[165] Our examination of Article 103 and of the relevant articles of the *Mejelle*, including Article 1272, demonstrates that the "leave" from the Sultan required by these articles is essentially no more than a police measure. It is certainly not an expression of ownership. Moreover, this Ottoman legislation concerning waste land existed prior to 1925. The recourse by Doukhan to Ottoman law in 1953 came only as an afterthought. It is important to recall that this thesis developed solely from a misunderstanding of the Public Notice of December 1, 1921.

The real explanation for the renewed zeal in 1953 in favor of the interpretation of the Public Notice of December 1, 1921 can be found in a book written by the same author in collaboration with Goadby, in 1935.[166] Basing their argument primarily on a "Cyprus case," *Kyriako v. Principal Forest Officer*,[167] the authors state that "[a]ll *Mewat* land *appears* to fall within the definition of Public Lands."[168] [Emphasis supplied]. The conjectural nature of the inclu-

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158. State Property Law of 1951, 5 LAWS OF THE STATE OF ISRAEL 45 (1950-51). *See* text accompanying note 61, *supra*.

159. M. DOUKHAN, LAND LAW IN THE STATE OF ISRAEL (2nd ed. 1953) [hereinafter cited as DOUKHAN].

160. M. DOUKHAN, LAND LAW OF THE LAND OF ISRAEL 26-27 (1st ed. 1925).

161. DOUKHAN, *supra* note 159, at 334.

162. M. DOUKHAN, LAND LAW OF THE LAND OF ISRAEL 26-27 (1st ed. 1925).

163. *See* text accompanying note 55 *supra*.

164. Ottoman Land Law, art. 103. *See* ONGLEY translation, *supra* note 4, at 54-55. *See also* accompanying notes 37-41 *supra*.

165. *Mejelle*, *supra* note 39, art. 1272. Article 1272 provides: "If any person, after obtaining Sultanic permission (*idhn*) vivifies and cultivates any place consisting of waste land, he becomes the owner thereof. If the Sultan or his representative gives permission to any person to vivify land on the terms that he shall merely make use of such land without becoming owner thereof, such person may possess the land in the way he has been permitted to do, but he does not become the owner thereof." *Id.*

166. GOADBY & DOUKHAN, *supra* note 50.

167. Kyriako v. Principal Forest Officer [1894] 3 CYPRUS LAW REPORTS [C.L.R.] 96, 97. Court decisions from Cyprus never had any binding force in Palestine, and certainly not later in Israel.

168. GOADBY & DOUKHAN, *supra* note 50, at 67.

sion of waste land within the concept of "Public Lands" has already been noted.[169] Moreover, there is no mention in this context of the Public Notice of December 1, 1921.

The Cypriot court properly consulted Ottoman law in order to resolve the issues before it. However, the court's analysis of Ottoman law was incorrect. The entire weight of the *Kyriako* court's argument rested upon an unsupportable belief: "*Me[w]at* land is, in the Ottoman Empire, *we believe,* in theory, the property of the Sultan as Caliph."[170] [Emphasis supplied.] This belief is expanded in the court's decision:

> *If* the true principle of the law be that the me[w]at land in the Ottoman dominions is the property of the Sultan as Caliph . . . then it *appears* to us that on principle the Sultan, or the Government of Cyprus, as representing him, cannot be compelled without his or its consent . . . merely owing to the fact that this person has broken up and cultivated *arazi-me[w]at.*[171]

In the view of 'Alī Haydar,[172] foremost commentator of the *Mejelle,* a person can compel the Sultan to consent to the vivifier's ownership of the land he has vivified, provided that the vivifier's failure to obtain prior permission was not due to negligence.[173] Thus, there was no justification for the *Cypriot* court's reluctance to place a limitation upon the Government's powers in relation to waste land:

> To hold that a person by cultivation, without the assent or knowledge of the Government, is entitled to force the Government to recognize him as a tenant, is to place a limitation upon its powers which would place it in a worse position even than if it were a private owner.[174]

The position of the Government was indeed worse than that of a private owner, so long as the Ottoman Government did not have a law for the acquisition of land for public purposes.

Waste land was never government or state land. Any assertion that it was state land ignores the fundamental difference between state (*miri*) land, defined in Article 3 of the 1858 Ottoman Land Law,[175] and waste land (*mewat*), defined in Article 6 of the same law.[176] Legal ownership (*raqabe*) of state land, although not necessarily "possession" (*tasarruf*), "is vested in the Treasury,"

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169. *See* text accompanying notes 137-140 *supra.*
170. *Kyriako,* 3 C.L.R. at 96.
171. *Id.* at 97 (emphasis supplied).
172. *See* note 40 *supra.*
173. *See* text accompanying notes 39-47 *supra.*
174. *Kyriako,* 3 C.L.R. at 97.
175. Ottoman Land Law, art. 3. *See* ONGLEY translation, *supra* note 4, at 3-4.
176. Ottoman Land Law, art. 6. *See* ONGLEY translation, *supra* note 4, at 6.

while neither "legal ownership" nor "possession" of waste land is vested in any entity,[177] least of all in the state, which in Ottoman times, as already mentioned,[178] had no legal capacity.[179] Moreover, in Palestine, the 1921 *Mewat* Land Ordinance[180] alleviated the judicial problem arising in "those cases in which the land so broken up without permission is required for purposes beneficial to the community at large,"[181] since that Ordinance denied any rights to vivifiers without prior permission. With the enactment of the 1943 Land (Acquisition for Public Purposes) Ordinance,[182] the concern of the *Cypriot* court for waste land needed for the benefit of the entire community has certainly lost all validity in Palestine. The same Ordinance, transformed into a Jordanian law,[183] is in force to the present in Judea and Samaria.

The conclusions of the *Cypriot* court were erroneous and could not reinforce the misinterpretation of the Public Notice of December 1, 1921. In addition, a Cypriot judicial decision interpreting Ottoman Law can hardly override the opinion of 'Alī Haydar, who made it abundantly clear that waste land is not state land.[184]

B. *Decisions of the Palestine Supreme Court*

Two decisions of the Supreme Court of Palestine have been cited for the proposition that waste land is owned by the state.[185] In fact, both of these cases deal with errors in Land Registry entries. In *Government of Palestine v. Dirbas,*[186] the Government claimed the balance between the 32 *dounams* and 196 meters of land actually owned by Dirbas and the 3,296 *dounams* of land which were registered in his name. In *Abramov v. Government of Palestine,*[187] a correction of an existing registration in the name of the Government was sought. *Abramov* makes no reference to any waste land. In *Dirbas,* only the land not claimed by the Government, *i.e.,* "the original grant to Dirbas," "was *mewat.*"[188] The

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177. Ottoman Land Law, art. 6. *See* ONGLEY translation, *supra* note 4, at 6.

178. *See* § III *supra.*

179. For an examination of the irksome problems created in the Ottoman Empire by the absence of legal capacity for juristic persons, *see* N.H. CHIHA, TRAITÉ DE LA PROPRIÉTÉ IMMOBILIÈRE EN DROIT OTTOMAN 132 (1906).

180. *Mewat* Land Ordinance, *supra* note 26.

181. *Kyriako,* 3 C.L.R. at 97.

182. Land (Acquisition for Public Purposes) Ordinance of 1943, PALESTINE GAZETTE EXTRAORDINARY, No. 1305, Supp. No. 1, Dec. 10, 1943, at 44.

183. *Qanun Istimlak al-Aradi lil-Mashari 'al-'Amma,* Law No. 2 of 1953. The text is *reprinted in* MAJMU 'AT AL-QAWANIN WAL-ANZIMA 242 (1958) (a collection of laws and regulations, issued by the Jordanian Bar).

184. *See* § III(c), *supra.*

185. DOUKHAN, *supra* note 159, at 334, n.39.

186. Government of Palestine v. Dirbas [1944] 11 P.L.R. 397.

187. Abramov v. Government of Palestine [1946] ANNOTATED LAW REPORTS 143.

188. *Dirbas,* 11 P.L.R. at 401-02.

dispute arose in the process of land settlement. The Government's right to unclaimed land is well established by Article 29 of the 1939 Land (Settlement of Title) (Amendment) Ordinance.[189] There was no need to base the Government's rights on the characterization of the tract as waste land. Neither court decision attempts to establish that waste land belongs to the Government.

C. *The Influence and Applicability of English Legal Concepts*

Despite the legal inaccuracy of *Kyriako,* the reliance of Doukhan and Goadby upon the decision is explicable. In both Cyprus and Palestine, judges and lawyers were either British or at least trained in English law. "The basis of English land law is that all land in England is owned by the Crown."[190] Eventually, the doctrine of land tenure became universal in England. Every acre of land in the country was held by the King.[191] Prior to the Crown Suits Act of 1769,[192] (the *Nullum Tempus Act*), the Statute of Limitations did not bind the Crown.[193] Under the Law of Property Acts of 1922[194] and 1925,[195] the Crown retained the right to take land left with no heir as *bona vacantia,*[196] in the same way as it obtained goods. Therefore, it is not surprising that in the absence of any discernible owner of waste land, as defined in Articles 6[197] and 103[198] of the 1858 Ottoman Land Law, the tendency of an English-trained lawyer would be to attribute the ownership to the state. Doukhan, who was not English, did define the legal nature of waste land correctly as *res nullius,*[199] but later contradicted himself by claiming that in Ottoman times waste land already was state land.[200] The influence of English law was so pervasive that Goadby and

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189. Land (Settlement of Title) (Amendent) Ordinance of 1939, PALESTINE GAZETTE, No. 964, Supp. No. 1, art. 29 (Nov. 23, 1939) (amending Land Settlement Ordinance of 1928, OFFICIAL GAZETTE OF THE GOVERNMENT OF PALESTINE, No. 212, art. 28 (June 1, 1928)). *See* text accompanying notes 147-148 *supra.*

190. R. MEGARRY & H. WADE, THE LAW OF REAL PROPERTY 13 (3rd ed. 1966).

191. 1 F. POLLOCK AND F. MAITLAND, HISTORY OF ENGLISH LAW 211 (1st ed. 1895) [hereinafter cited as POLLOCK & MAITLAND]. Pollock and Maitland states: "The person whom we may call the owner, the person who has the right to use and abuse the land, to cultivate it or leave it uncultivated, to keep all others off it, holds the land of the King either immediately or mediately." *Id.*

192. Crown Suits Act, 1769, 9 Geo. 3, c.16.

193. G. CHESHIRE, MODERN LAW OF REAL PROPERTY 807 (10th ed. 1967).

194. Law of Property Act, 1922, 12 & 13 Geo. 5, c. 16.

195. Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20.

196. G. CHESHIRE, MODERN LAW OF REAL PROPERTY 26 (10th ed. 1967).

197. Ottoman Land Law, art. 6. *See* ONGLEY translation, *supra* note 4, at 6. However, article 6 was not discussed by the Cypriot court in connection with its "belief" that waste land was the property of the Sultan as Caliph. *Kyriako,* 3 C.L.R. at 97.

198. Ottoman Land Law, art. 103. *See* ONGLEY translation, *supra* note 4, at 54-55. Article 103 is cited in the text accompanying note 32 *supra.*

199. M. DOUKHAN, LAND LAW OF THE LAND OF ISRAEL 26-27 (1st ed. 1925). *See* text accompanying note 160 *supra.*

200. DOUKHAN, *supra* note 156. *See* text accompanying note 164 *supra.*

Doukhan did not attempt to compare Article 6 with Article 3 of the 1858 Ottoman Land Law.[201] A comparison would have exposed the discrepancy between possession, which is discussed in both articles, and ownership, which is mentioned only in Article 3, where it is attributed to the state.

The obscurity as to the ownership of waste land resulting from the silence on this point in Article 6 resembles the ambiguity in Article 7 of the 1929 Antiquities Ordinance,[202] enacted by the British Mandate legislature. Article 7 states:

> (1) The High Commissioner shall have the right to acquire, in accordance with the provisions of this Ordinance, any antiquity which may be discovered in Palestine after the date hereof; and until such right has been renounced *no person shall enjoy any right or interest in such antiquity by reason of his being the owner of the land in which the antiquity is discovered or being the finder of the antiquity.* Nor shall any such person be entitled to dispose of the antiquity; and any person to whom such antiquity is transferred shall have no right or property therein.
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> . . . .
>
> (4) The Director may in writing renounce the right of the High Commissioner to acquire an antiquity under this Section, but the right shall continue to exist until it has been so renounced.[203]

The District Court of Jerusalem, disposing of a criminal appeal from the Magistrate's Court, decided by a majority that the meaning of the clause "no person shall enjoy any right or interest in such antiquity" means that the antiquity is *res nullius (hefquer).*[204] On appeal, the Israeli Supreme Court adopted the minority opinion of the District Court, deciding that so long as the High Commissioner does not acquire the antiquity or renounce his right to acquire it, the antiquity is not *res nullius*. The said clause does not deprive individuals of any rights under the ordinary laws of property. Its sole purpose is to ensure the High Commissioner's right to acquire the antiquity. "In other words, the clause (no person shall enjoy any right in such antiquity) means that *vis-a-vis* the High Commissioner, nobody has any right in the antiquity."[205]

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201. *See* § II(B) *supra.*

202. Antiquities Ordinance of 1929, OFFICIAL GAZETTE OF THE GOVERNMENT OF PALESTINE, No. 236 (June 1, 1929) (effective Dec. 31, 1929). This Ordinance is now replaced by the 1978 Antiquities Law.

203. Antiquities Ordinance of 1929, OFFICIAL GAZETTE OF THE GOVERNMENT OF PALESTINE, No. 236, art. 7(1), (4) (June 1, 1929) (effective Dec. 31, 1929) (emphasis supplied).

204. State of Israel v. Muhammad Tamyiza, (1978) 32(2) P.D. 599, 610. On the basis of this finding the accused who had taken the antiquities aspired to be acquitted from the charge of theft.

205. *Id.* at 610-11.

The High Commissioner's perspective, (and that is what interests us in the context of waste land) with regard to the antiquity is similar to his position with regard to waste land, following the 1921 *Mewat* Land Ordinance.[206] In the same way as the High Commissioner has a right in every antiquity before he acquires or renounces it without ownership, so he has control over the waste land without actually owning it. Therefore, the status allotted to waste land under the British Mandate legislation was by no means unique.

The belief emanating from English law that the Crown possesses all land is not applicable for another reason. English law began to affect land law in Palestine due to the ineffectiveness of the remedies offered by Ottoman law for breach of contract, at least according to interpretation of Ottoman law by the local courts.[207] Despite the Court's reticence,[208] English law was incorporated into the local private law through the equitable remedies of English contract law. With regard to real rights in land, the opinion prevailed throughout the British Mandate period, and even for a number of years after the establishment of the State of Israel, that courts should not resort to English law.[209] Thus, real rights to land in Judea and Samaria were never subjected to the in-

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206. *Mewat* Land Ordinance, *supra* note 26. The Mewat Land Ordinance is cited in the text accompanying note 123 *supra*.

207. However, in Khoury Syndics v. Slavousky, [1938] 5 P.L.R. 378, 386, Frumkin, J. did point to Article 262 of the *Mejelle, supra* note 39, art. 262, which states that after a sale has been concluded, the vendor is under obligation to deliver the goods sold to the purchaser. In his opinion, this article provided the remedy which closely resembles specific performance, considered lacking in Ottoman law with regard to immovables. *See* L. DOUKHAN-LANDAU, EQUITABLE RIGHTS TO LAND AND THE REMEDY OF SPECIFIC PERFORMANCE OF CONTRACTS FOR SALE OF LAND 16, n.39 (1968). However, "the deep conviction reflected in many judicial pronouncements" was "that there was no law whereby an agreement for the sale of land could be enforced by specific performance in Palestine." *Id.* at 17. For the introduction into Palestine of the distinction between liquidated damages and penalty, and in its wake the doctrine of specific performance, *see id.* at 18. The distinction between liquidated damages and penalty is now incorporated in Article 178 of the Jordanian Law of Civil Procedure of 1952, which applies in Judea and Samaria.

208. In Minkovitz v. Fishzner, [1949] 2 P.D. 39, the Supreme Court relied on Palestine Mercantile Bank Ltd. v. Frayman, [1938] 5 P.L.R. 159, and on Paz v. El Zeidan, [1938] 5 P.L.R. stating: "Already under the British Mandate this Court held time and again that English law is not to be followed if the issue under discussion found some solution, even if it is not exhaustive, and even if it is faulty and fragmentary, in the parallel chapters which are found in the laws of the country."

209. 11 HALSBURY'S LAW OF ENGLAND 286 (2nd ed. 1933) was cited in Levy v. Klein, [1949] 2 P.D. 107 to found a claim for an easement allegedly created by necessity. The claim was set aside on the ground that "this legal field has been deeply ploughed by the local legislator," meaning the Ottoman legislator. No "easement by necessity" can be recognized since this legislator knows nothing about it. Still in 1966 the Supreme Court refused to have recourse to English law in order to "complete" the local law of gift with regard to disputed parcels of land. Rot v. Administrator of the Estate of Brayer, [1966] 20(3) P.D. 85, 89. As pointed out by Dr. E. Kaplan, in Shelev v. Nevh Harerei Moav, [1967] 21(1) P.E. 617, the Supreme Court actually deviated from Levy by recognizing the possibility of the creation of a right of passage "by necessity." *Kaplan, 'Truth and Stability' as Reflected in the Decisions of the Supreme Court of Israel,* 6 TEL-AVIV U.L. REV. 576, 596 (1979).

fluence of English law under the British Mandate, nor were they exposed to this influence under Jordanian rule. Quite the contrary, the influence of English law which remained under Jordanian rule in Judea and Samaria was rapidly declining, and certainly did not affect real rights in land.

VII. THE CONTEMPORARY EXERCISE OF CONTROL OVER THE WASTE LAND OF JUDEA AND SAMARIA

A. *Jordanian Provisions Relating to Waste Land*

1. Early Laws and Ordinances

As indicated *supra,*[210] the Jordanian Government that formerly occupied Judea and Samaria never appropriated the waste lands in those territories. Jordan's activities with regard to waste land will be examined without prejudice to the more fundamental issue as to whether Jordan, as the occupying power, could appropriate any land in the occupied territory under international law.

Waste land (*mewat*) is mentioned explictly in only one of Jordan's laws concerning state property. The Preservation of State Lands and Properties Law of 1961[211] defines "State lands and properties" as including waste land.[212] However, Section 2, which contains this definition, explicitly states that the definition is valid only "for the purposes of this Law."[213] Indeed, the purposes of the law are largely identical with those of the 1921 *Mewat* Land Ordinance.[214] Both of these enactments were intended to preserve land from trespass by unauthorized individuals. The 1921 *Mewat* Land Ordinance did not succeed in preventing encroachment upon these lands.[215]

Similarly, the courts under the British Mandate were not particular in

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210. *See* text accompanying note 63 *supra.*

211. The Preservation of State Lands and Properties Law of 1961, Law No. 14, JORDANIAN OFFICIAL GAZETTE, No. 1541, at 393 (Apr. 1, 1961).

212. *Id.*

213. *Id.* § 2.

214. *Mewat* Land Ordinance, *supra* note 26. The text of the Mewat Land Ordinance is cited in the text accompanying note 123 *supra.*

215. Evidence to this effect is found, *e.g.,* in the writings of Aref El-Aref, district commissioner at Beer-Sheba for the whole south of the country under the British Mandate. AREF EL-AREF, KITAB AL-QADA BYAN-A AL-BADW 235 (1953) (The Book of Jurisdiction among the Bedouins). He states:

> At the beginning of the period in which the Bedouin's tendency to acquire lands emerged, they used to seize control *(hajr)* of land which they did not buy from its owner. The strong person was the one who could seize control, whether he was a chieftain or a beggar. Seizing control (*hajr*) means that you come to a piece of land, you stay there, then you point at the area which you want to exploit and you say to those present: "This is my land."

Id. at 235 n.1. He states further that "[t]he Bedouin who seized control of land for himself or for his tribe did not think about registering the land seized, despite the existence of a Land Registration Bureau at that time." *Id.* at 235.

applying the restriction of the 1921 *Mewat* Land Ordinance.[216] Under this restriction, only vivification completed before this Ordinance was acquisitive for individuals.[217] This explains why the Jordanian legislature had to preoccupy itself with the preservation of waste land. However, there is no state appropriation of waste land under this law.

The earliest Jordanian Law concerned with state property, enacted while Jordan occupied Judea and Samaria, is Law No. 1 of 1953, Management and Conveyance of State Property.[218] Article 5 contains an implied reference to waste land owned by the State: "If a person has possessed or has taken on lease State land with the intention to vivify it, and he had received it (*watafawad - ha*), the rights in this possession and in this lease devolve after him to his heirs."[219]

As noted *supra*,[220] Section 28 of the 1928 Land (Settlement of Title) Ordinance, as amended in 1939,[221] led to the registration and consequent appropriations of waste land in the name of the Government. The same effect is now achieved by Section 8(4) of the 1952 Jordanian Settlement of Land and Water Law.[222] The opportunity for an individual to possess or lease waste land which belongs to the state is quite consonant with these provisions. However, this approach does not affect waste land which has not been conveyed (notably through registration) to state ownership.

2. The 1961 and 1965 Jordanian Management of State Property Laws

The 1961 Management of State Property Law[223] defines "state property" as "immovable property owned by the state in accordance with the laws in force."[224] This definition contrasts with the definition of "State Property" in the 1965 Management of State Property Law:[225] "Immovable property possessed (*tatasarrafa - ha*) or owned (*tamliku - ha*) by the State."[226] The separate

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216. *Mewat* Land Ordinance, *supra* note 123. The text of the *Mewat* Land Ordinance is cited in the text accompanying note 123 *supra*.

217. It is only since State of Israel v. Badran, [1962] 16 P.D. 1717, 1717E, that this practice of the courts has ceased.

218. Management and Conveyance of State Property Law of 1953, Law No. 1, JORDANIAN OFFICIAL GAZETTE, No. 1130, at 432 (Jan. 1, 1953).

219. *Id.* art. 5.

220. *See* text accompanying notes 147-148 *supra*.

221. Land (Settlement of Title) (Amendment) Ordinance of 1939, PALESTINE GAZETTE, No. 964, Supp. No. 1, art. 29 (Nov. 23, 1939) (amending Land Settlement Ordinance of 1928, OFFICIAL GAZETTE OF THE GOVERNMENT OF PALESTINE, No. 212, art. 28 (June 1, 1928)).

222. Jordanian Settlement of Land and Water Act of 1952, Law No. 40, JORDANIAN OFFICIAL GAZETTE, No. 1113, § 8(4), at 280 (July 16, 1952).

223. Management of State Property Law of 1961, Law No. 13, JORDANIAN OFFICIAL GAZETTE, No. 1541, at 392 (Apr. 1, 1961).

224. *Id.*

225. Management of State Property Law of 1965, Law No. 32, JORDANIAN OFFICIAL GAZETTE, No. 1863, at 1175 (Aug. 1, 1965).

226. *Id.*

categorization of immovable property which is possessed but not owned by the state, is explained by Section 15 of the same law, which deals with lands "not surveyed nor fixed on the maps of the Lands and Survey Department."[227] Under previous State Property Laws there is reference neither to lands held merely in "possession" nor to land "not surveyed nor fixed on the maps of the Lands and Survey Department." These lands may be distributed with a view toward "making them suitable for agriculture."[228] A person who develops the land in this manner has a right of priority (*awlawiyya*) to receive it on lease when the land is surveyed and fixed on the maps. These provisions of Section 15 of the 1965 Management of State Property Law are consistent with Article 103 of the 1858 Ottoman Land Law.[229] It is only through the vivification of the waste land that the state may obtain ownership rights. Prior to vivification, under the 1921 *Mewat* Land Ordinance[230] and the 1961 Preservation of State Lands and Properties Law,[231] the state has no more than bare control. After vivification, and consequent state ownership, the vivifier could only lease the land.[232]

Section 15 of the 1965 Jordanian Management of State Property Law[233] is actually more stringent than the original Article 103 of the 1858 Ottoman Land Law.[234] Under the 1965 Jordanian Law, the authorized vivifier has no more than a right of priority to be registered as a lessee,[235] while under the Ottoman Land Law the authorized vivifier obtained the lease immediately.[236] Regardless of the exact interpretation of this provision, Section 15 of the 1965 Jordanian Law confirms the existence of waste land not owned by any state in Judea and Samaria.

B. *Vivification of Waste Land in Judea and Samaria*

The prior discussion makes it clear that no expropriation is needed for the establishment of Israeli settlements on waste land in Judea and Samaria. This kind of land simply has no proprietor. The competent authority, at present the

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227. *Id.* § 15.

228. *Id.*

229. Ottoman Land Law, art. 103. *See* ONGLEY translation, *supra* note 4, at 54-55. Article 103 is cited in the text accompanying note 32 *supra*.

230. *Mewat* Land Ordinance, *supra* note 26.

231. The Preservation of State Lands and Properties Law of 1961, Law No. 14, JORDANIAN OFFICIAL GAZETTE, No. 1541, at. 393 (Apr. 1, 1961).

232. Management of State Property Law of 1965, Law No. 32, JORDANIAN OFFICIAL GAZETTE, No. 1863, § 15 (Aug. 1, 1965).

233. *Id.*

234. Ottoman Land Law, art. 103. *See* ONGLEY translation, *supra* note 4, at 54-55. Article 103 is cited in the text accompanying note 31 *supra*.

235. Management of State Property Law of 1965, Law No. 32, JORDANIAN OFFICIAL GAZETTE, No. 1863, § 15 (Aug. 1, 1965).

236. Ottoman Land Law, art. 103. *See* ONGLEY translation, *supra* note 4, at 54-55.

Military Governor,[237] must merely be satisifed that the settlers will vivify the waste land. This is the sole requirement for the issuance of a government permit, which must be obtained prior to the vivification of waste land both under Article 103 of the 1858 Ottoman Land Law,[238] and under Section 15 of the 1965 Management of State Property Law.[239]

The extent of waste land in Judea and Samaria is very large. In 1935, it was observed that "[a] very large part of the area of Palestine is *Mewat.*"[240] Both geographical and human factors contributed to this configuration. In particular, the slope east of the watershed, running from north to south along the peaks of the mountains of Judea and Samaria, receives little moisture and remains a desert.[241] Geographically, the desert from the watershed to the Jordan River is an incursion of the vast Arabian desert, which stretches over most of the Arabian peninsula.

The proximity of the desert exposed Palestine, as well as the rest of the Fertile Crescent, to harassment and devastation by the desert Bedouins. In Galilee no fewer than 460 deserted villages were found over an area of 4000 square miles.[242] In the subdistrict of Nablus and Tul-Karem in Samaria, soil conservation specialists under the British Mandate found that only 8 percent of the very steep slopes and 14 percent of the steep slopes had terraces, while relics of ancient terraces pre-dating the Arab conquest of the 7th century show that half of the slopes were protected in this manner.[243] This is an area which absorbed Arab tribes.[244] British specialists calculated that the western slopes of the Judean mountains lost between 200 and 400 million square meters of eroded soil since the time following the Roman period. The area worst hit by the desertion of villages was the Negev. Archaeologists have noted that the cultivated areas had begun to shrink in the Negev in the 7th century, *i.e.*, with the Arab conquest. Therefore, the decreasing cultivated area was a

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237. Under Proclamation No. 2 of June 7, 1967, *reprinted in* 1 COLLECTION OF PROCLAMATIONS AND ORDINANCES JUDEA AND SAMARIA 3-4 (1967), "[e]very power of government, legislation, appointment and administration" is vested in the Military Governor.

238. Ottoman Land Law, art. 103. *See* ONGLEY translation, *supra* note 4, at 54-55. Article 103 is cited in the text accompanying note 31 *supra.*

239. Management of State Property Law of 1965, Law No. 32, JORDANIAN OFFICIAL GAZETTE, No. 1863, § 15 (Aug. 1, 1965).

240. GOADBY & DOUKHAN, note 50 *supra,* at 67.

241. To this day, the dryness of this area has helped to preserve, at Qumran and Matzada, the Dead Sea Scrolls, left there two thousand years ago by Jews.

242. A.E. MADER, ALTCHRISTLICH BASILIKEN UND LOCALTRADITIONEN IN SUBJUDAA 6 (1918).

243. Shaw & Pharaon, *Nablus-Tulkarem Valley,* GOVERNMENT OF PALESTINE, SOIL CONSERVATION BOARD, BULL. NO. 1 (1941).

244. The geographer J. Karmon, in his study of the Sharon coastal plane, concluded that 42.8 percent of the villages there had been abandoned between the Arab conquest and the crusades. Karmon, *The Physiographic Conditions of the Sharon and Their Influence on the Development of Settlements,* 23 BULL. OF THE HEBREW SOCIETY FOR THE STUDY OF THE LAND OF ISRAEL AND ITS ANTIQUITIES 130 (1959).

phenomenon which began with the Arab conquest and the penetration of the Bedouins. This process continued long after the Arab conquest.[245]

In addition, ever since the High Middle Ages, Palestine suffered from a policy of willful destruction. As stated by historian David Ayalon:

> [I]t is only in the light of the steady decline of Moslem naval might in the Mediterranean Sea that the modern historian can pass a fair judgment on the destruction of the cities and fortifications of the Syro-Palestinian coastline by the M[o]sl[e]ms. This deliberate and systematic campaign of destruction was begun by the Ayyubids, but carried out chiefly by the Mamluks.[246]

The inability of the Moslem forces to defend Acre against the Third Crusade, and subsequent military defeats led to the development of a new Moslem strategy. Ashkelon was the first city destroyed under the new policy, which was to last for many generations. Moslem armies consistently pursued this policy of destruction throughout the coastal plain. Although the new Moslem strategy was initiated by the Ayyubids, it was the Mamluks who eventually removed Crusader forces from the Syro-Palestinian coastline.[247]

Destroyed and neglected, the relatively well-watered areas developed swamps and marshes and became infested with malaria. The early Jewish pioneers had to combat this disease while draining the swamps, many of them paying with their lives and the lives of their families in the process. Indeed, the configuration of the Jewish settlement in modern times in the country is closely related to the location of the waste lands.[248]

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245. *See* Ashtor, Book Review, 24 THE NEW EAST QUARTERLY OF THE ISRAEL ORIENTAL SOCIETY 201, 207-08 (1974) (a review of Cassirer, III PAPERS ON ISLAMIC HISTORY III, in ISLAMIC CIVILIZATION 950-1150 (D.S. Richards ed. 1973)).

246. Ayalon, *The Mamluks and Naval Power,* 1(8) PROCEEDINGS OF THE ISRAEL ACADEMY OF SCIENCES AND HUMANITIES, at 7 (1965).

247. *Id.*

> It was thus Mamluk naval weakness which dictated the destruction of the Syro-Palestinian coast; this step was unavoidable. In all its known history this coast never suffered such ruin. Furthermore, to the best of my knowledge, throughout the history of Islam, nowhere else in the Moslem world, from the Atlantic to the Pacific Ocean was there destruction to equal in thoroughness, scale and gravity of its lasting consequences, the destruction of this coast by the Mamluks.

Id. at 8.

248. The Arab charge that the Jews have obtained too large a proportion of good land cannot be maintained. Much of the land now carrying orange groves was sand dunes or swamp and uncultivated when it was purchased. Though [today], in the light of experience gained by Jewish energy and enterprise, the Arabs may denounce the vendors and regret the alienation of the land, there was at the time at least of the earlier sales little evidence that the owners possessed either the resources or training needed to develop the land. So far as the plains are concerned, we consider that, with due precautions, land may still be sold to Jews.

SECRETARY OF STATE FOR THE COLONIES TO PARLIAMENT BY COMMAND OF HIS MAJESTY, PALESTINE ROYAL COMMISSION REPORT, Cmd. 5479, at 242 (1937). *See* A. GRANOTT, THE LAND SYSTEM IN PALESTINE 110 (1952).

C. *Israeli Authority to Permit the Vivification of Waste Land*

In exercising his authority to grant permission to settlers to vivify waste land, the Military Governor must act in the best interest of the country. Even if it is asserted that Israel is no more than a belligerent occupant in Judea and Samaria, the Military Governor may "sell the crops from public land, cut and sell timber in the public forests, let public land and buildings for the time of his occupation and the like."[249] Article 55 of the Hague Regulations of 1907 (War on Land Convention)[250] provides: "The occupying State shall be regarded only as administrator and usufructuary of public buildings, *land property,* forests and *agricultural undertakings* belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of such properties, and administer them in accordance with the rules of usufruct." [Emphasis supplied.][251]

D. *Jordanian Legislation Regarding Alien Ownership of Real Property*

Assuming the validity of Jordanian legislation which discriminates against foreigners, notably against Jews,[252] those laws do not prevent the vivification of waste land. It is true that the 1953 Law of Hire and Purchase of Immovables by Foreigners[253] prohibits non-Jordanians from owning land in rural areas[254] and restricts a lease of land by aliens to three years.[255] However, the Military Governor or, formerly, the Council of Ministers, can extend this term. Vivification of unregistered land grants the vivifier no more than a right of priority to receive the land on lease.[256] Vivification is dependent upon an

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249. L. OPPENHEIM, INTERNATIONAL LAW 397-98 (4th ed. Lauterpacht 1952).

250. The Hague Convention of 1907, The Laws and Customs of War on Land, art. 55, *reprinted in* THE HAGUE CONVENTION AND DECLARATIONS OF 1899 AND 1907 (J. Scott ed. 1918).

251. *Id.*

252. *See, e.g.,* Jordanian Nationality Law of 1954, *as amended* in JORDANIAN OFFICIAL GAZETTE, No. 1675, at 290 (Apr. 1, 1963). "Any person *who is not a Jew* and who was of Palestinian nationality before 15th May 1948 and was found ordinarily in the Hashemite Kingdom of Jordan during the period from 20th December 1949 to 16th February 1954 is Jordanian." *Id.*

On May 15, 1948, the British Mandate in Palestine ended. On December 20, 1949, the Supplementary Law to the Nationality Law, No. 56 of 1949, JORDANIAN OFFICIAL GAZETTE, No. 1004 (Dec. 20, 1949) came into effect. It applied Jordanian nationality to the Palestinians who inhabited the area in Western Palestine occupied by Jordan. February 16, 1954, is the precise date of the 1954 Jordanian Nationality Law. Denied Jordanian nationality, Jews are necessarily subject to the limitations imposed upon foreigners. *See* N. STILLMAN, THE JEWS OF ARAB LANDS (1979).

253. Law of Hire and Purchase of Immovables by Foreigners of 1953, Law No. 40, JORDANIAN OFFICIAL GAZETTE, No. 1134, at 558-59 (Feb. 16, 1953).

254. *Id.* § 4.

255. *Id.* § 3.

256. Management of State Property Law of 1965, Law No. 32, JORDANIAN OFFICIAL GAZETTE, No. 1863, § 15 (Aug. 1, 1965). *See* text accompanying note 233 *supra.* Though full ownership of land by foreigners is prohibited, lesser rights such as the right of priority to

authorization by a governmental authority which is of lower status than the Council of Ministers. Thus, these restrictions on alien land use do not preclude the vivification of waste land in Judea and Samaria.

Foreign corporations are allowed to purchase rural land subject to the authorization of the Council of Ministers. However, ownership is permitted only to the extent necessary for corporate activities and only if their ownership is deemed to serve the public interest.[257] Despite the doubtful applicability of these restrictions to vivification by foreign corporations, Order No. 419 of 1971[258] empowered the Military Governor to allow any corporation to use any immovable property located in Judea and Samaria. Moreover, Order No. 71 of 1967, as amended on August 15, 1972,[259] abolished all Jordanian Legislation aimed at boycotting "the State of Israel, her inhabitants or corporations registered in Israel." Any legal objections against Orders No. 419 and 71 based upon international law apply *a fortiori* to Jordanian legislation relating to land. The sovereignty of Jordan over Judea and Samaria was never recognized by the international community. Today, following Jordan's renunciation of whatever sovereign rights it may have had over Judea and Samaria, that sovereignty can hardly be invoked as a basis for the continued validity of its legislation.

Thus, no past or present Jordanian legislation can be cited against the legality of the Israeli settlements on waste land in Judea and Samaria.

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receive the land on lease, are not precluded by this prohibition. This is shown by Section 3 of Law of Hire and Purchase of Immovables by Foreigners of 1953, which enables foreigners to hire land. Law of Hire and Purchase of Immovables by Foreigners of 1953, Law No. 40, JORDANIAN OFFICIAL GAZETTE, No. 1134, § 3 (Feb. 16, 1953).

257. The restrictions apply only to three activities of the foreign corporations: *ihraz, tamalluk* and *tasarruf.* Law of Hire and Purchase of Immovables by Foreigners of 1953, Law No. 40, JORDANIAN OFFICIAL GAZETTE, No. 1134, § 3 (Feb. 16, 1953). The latter two mean possession and disposition and are not relevant to the activity of vivification. The difficulty lies in the former term. *Ihraz* in classical Arabic has the connotation of "to guard (property) carefully" (*See* H.G. HAVA, ARABIC-ENGLISH DICTIONARY 118 (1951). *See also* A. DE BIBERSTEIN KARZIMIRSKI, DICTIONNAIRE ARABE-FRANÇAIS 406(1860)). If *ihraz* has this meaning, the vivification of Waste Land is not covered by the Law of Hire and Purchase of Immovables by Foreigners of 1953, and consequently, its restrictions do not apply to vivification by foreign corporations. If, on the other hand, a more modern meaning is to be attributed to this Arabic word, giving its verb the meaning of "to acquire," the restrictions may very well apply. The latter meaning is substantiated by the formula "to acquire, possess and dispose" which had been used in the 1927 Trans-Jordanian Law to Enable Foreign Corporations, Societies and Religious Bodies to Acquire Immovable Property in Trans-Jordan, *reprinted in* C.R.W. SETON, LEGISLATION OF TRANS-JORDAN 1918-1930 233-35 (1931).

258. Order No. 419 of 1971, TEHIKAT BITAHON 409 (1975) (Defense Legislation: A loose-leaf edition of the Collection of Proclamations, Orders and Appointments issued by the Legal Adviser, Headquarters, Israel Defense Forces Judea and Samaria).

259. Order No. 71 of 1967, TEHIKAT BITAHON 117, *as amended* on August 15, 1972 (Security Legislation: Issued by the Legal Adviser, Headquarters, Israel Defense Forces in Judea and Samaria).

E. *Jordanian Claims of Sovereignty*

Although there is no distinction between ownership and sovereignty under Moslem law,[260] and in spite of Jordan's proclivities towards Moslem law as attested, *inter alia,* by the detachment with which Jordan treats waste land,[261] and although the concept of the nation-state, having been imported in the Middle East, "has only a fragile hold in some countries of this region,[262] Jordan is nevertheless a subject of contemporary international law. On this basis it may be argued that, though waste land in Judea and Samaria is *res nullius* in private law, it is not *terra nullius* under international law, because the Jordanian occupation of these territories from 1949 to 1967 gave rise to rights and perhaps even to a title in favor of Jordan. Whatever the merits of this contention, Jordan's adherence to the Resolution of Arab Heads of State adopted at their summit meeting in Rabat on October 28, 1974[263] amounts to a renouncement by Jordan of any rights or title it may have had in Judea and Samaria. Thus Jordan's alleged sovereignty cannot be cited against the legality of Israeli settlements and installations on waste land in Judea and Samaria.

The Palestinians whose cause is upheld by the same Resolution have, at most, no more territorial rights than the tribes which — according to Mauritania — had formed a Mauritanian entity prior to the establishment of this state.[264] If established Moslem states maintained only a loose grip over waste land,[265] an inchoate entity such as the Palestinians can *a fortiori* hardly be considered as exercising an effective control and as having any rights in these lands.

VIII. CONCLUSION

Any mention of land has been significantly avoided in the Agreement between Egypt and Israel which calls for autonomy to be granted to the Palestinian Arabs.[266] This silence is not surprising if it is remembered that the autonomy plan was originally conceived by Israel and that Israel still understands this plan as providing the Palestinian Arabs with personal autonomy and not

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260. *See* text accompanying notes 116-18 *supra.*

261. *See* text accompanying notes 102-05 *supra.*

262. *Supplemental Middle East Aid Package for Israel and Egypt: Hearings on the Special International Security Act of 1979 Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on Foreign Affairs,* 96th Cong., 1st Sess. (1979) (statement of Harold H. Saunders, U.S. Assistant Secretary of State for Near Eastern and South Asian Affairs). "[T]he basic unit of political identity is the religious or ethnic or linguistic subgroup or area of the country." *Id.*

263. For the text of this resolution *see* THE MIDDLE EAST AND NORTH AFRICA 68 (25th ed. 1978-79).

264. *See* text accompanying note 80 *supra.*

265. *See* text accompanying notes 102-07 *supra.*

266. *See* the section on "Autonomy" *Legal Aspects of the Egyptian Israeli Peace Treaty,* 3 MIDDLE EAST CONTEMPORARY SURVEY FOR 1979 (1980).

territorial autonomy.[267] However, if questions of land and territory are raised they cannot be divorced from the local land law which applies to them and from local notions of territorial rights.[268] Under the local land law in Judea and Samaria, waste land is ownerless and can be appropriated through vivification of the land in a perfectly legal manner, to the benefit of the country and all its inhabitants.

Asked on June 13, 1979: "Do you foresee a time when through negotiations the United States might shift its position and consider the Israeli settlements legal?" Secretary of State Cyrus Vance replied: "The settlements are illegal. We have not changed our position with respect to that . . . I do not see any way in which our position on that would change."[269]

The way of the waste lands is quite available.[270]

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267. We agreed to give autonomy to the Arab residents in Judea, Samaria and Gaza. We never agreed that full autonomy would be given to the areas which are Judea, Samaria, and Gaza . . . I may inform the Knesset that two days after I had given this explanation to the U.S. President and his aides and advisors, a member of the American delegation told us that the argument was just and the President accepted it *in toto*."

KNESSET DEBATES (Mar. 20, 1979) (statement of Prime Minister Begin).

268. *See* § V(B) *supra*. *See also* note 100 *supra*.

269. N.Y. Times, June 15, 1979, § A, at 9, col. 3.

270. Asked about Israel's settlements policy which "the Carter administration has denounced as a violation of international law," the newly elected President of the United States, Ronald Reagan replied: "[t]o begin with, I don't think they were a violation of international law." U.S. NEWS & WORLD REPORT Jan. 19, 1981, at 25 (interview with the President-Elect).